Petition

81-1079

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No. .....

In The
Supreme Court of the United States
OCTOBER TERM 1981

NORTHEASTERN TELEPHONE COMPANY,
Petitioner,
v.
AMERICAN TELEPHONE & TELEGRAPH COMPANY;
WESTERN ELECTRIC COMPANY, INC. AND
THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. May a telecommunications monopolist maintain undisputed monopoly power (acquired through illegal tariffs) by employing acts and practices which would not be illegal if carried out by a firm not possessed of monopoly power regardless of its intent?

2. What limitations does the *Sherman Act* (15 U.S.C. § 1 et seq.) place upon a regulated public utility monopolist with respect to competition in those areas of its business where it is subject to competition?

3. May a telecommunications monopolist maintain monopoly power by setting prices in the relevant market below average total cost and escape liability under Section 2 of the *Sherman Act*, 15 U.S.C. 2 regardless of its intent?

4. May an antitrust plaintiff be effectively denied the right to a trial by jury through an appellate courts' systematic determination of disputed fact issues as if they were questions of law?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Northeastern Telephone Company, by its attorneys, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit dated May 27, 1981.

OPINIONS BELOW

The Opinion of the United States District Court for the District of Connecticut overruling the defendants' Motions to Dismiss is printed at pages A-1 to A-35, *infra* and is reported at 477 F. Supp. 251 (D. Conn., 1978). The jury findings and judgment of the Trial Court is printed at G-1 to G-5, *infra*. The Opinion of the United States

District Court for the District of Connecticut overruling the defendants' Motions for Judgment N.O.V. and for a New Trial and granting the plaintiff attorneys' fees is printed at pages B-1 to B-56, *infra*, and is reported at 497 F.Supp. 230 (1980). The Opinion of the United States Court of Appeals for the Second Circuit reversing "five of appellee's six claims of anticompetitive conduct", vacating the remainder of the judgment and remanding the case for a new trial on liability and damages only as to appellants' design of the "protective coupler arrangement" is printed at pages C-1 to C-41, *infra*, and is reported at 651 F.2d 76. The Order of the United States Court of Appeals for the Second Circuit denying Northeastern Telephone Company's Motion for Rehearing and Suggestion for Rehearing en Banc dated September 9, 1981 is printed at page D-1, *infra*, and is not officially reported.

JURISDICTION

The date of the Opinion of the United States Court of Appeals for the Second Circuit sought to be reviewed is May 27, 1981, which is also the date of its filing.

A petition for rehearing en banc was overruled by the United States Court of Appeals for the Second Circuit on September 9, 1981. Jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the *Sherman Act*, 15 U.S.C. § 1 which states:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall

make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Section 2 of the *Sherman Act*, 15 U.S.C. § 2 which states:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

Section 4 of the *Clayton Act*, 15 U.S.C. § 15 which states:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Plaintiff, Northeastern Telephone Company, is in the business of selling, installing and maintaining telephone business terminal equipment (BTE) including key telephones (KTS) and private branch exchanges (PBX) to business telephone users in the State of Connecticut. The

defendants are the American Telephone & Telegraph Company (AT&T), the Western Electric Company (WEC), the manufacturing and supply arm of the Bell System, and the Southern New England Telephone Company (SNET), the Bell System telephone operating company in the State of Connecticut.

Prior to 1968, SNET had 100% of the relevant market. The relevant market was stipulated to be the providing of business telephone terminal equipment in the State of Connecticut. SNET had 100% of the market because tariffs which the defendants had filed with the Federal Communications Commission (FCC) absolutely prohibited the attachment of *any* equipment to the defendants' telephone network. Then, in 1968, the FCC determined that the Bell tariffs were unreasonable and unlawful. Furthermore, they had been unreasonable and unlawful since their inception. In re *Use of Carterfone Device*, 13 FCC 2d 420, recon. denied, 14 FCC 2d 571 (1968). The *Carterfone* decision subjected the defendants to competition from companies such as plaintiff in certain areas of their business. It was the defendants' response to the advent of competition which gave rise to this litigation. Plaintiff sued defendants under § 4 of the *Clayton Act*, 15 U.S.C. § 15 to recover damages for violations of §§ 1 and 2 of the *Sherman Act*, 15 U.S.C. § 1 and § 2. Northeastern alleged that defendants had monopolized, attempted to monopolize and combined and conspired to monopolize the relevant market in violation of § 2 of the *Sherman Act*, 15 U.S.C. 2, and had combined and conspired in restraint of trade in violation of § 1 of the *Sherman Act*.

Defendants first moved to dismiss the complaint claiming that their conduct fell within the state action exemption

of *Parker v. Brown*, 317 U.S. 341 (1943) and alternatively on the basis that the Federal Communications Act (47 U.S.C. § 151, et seq.) created implied antitrust immunity for the alleged acts.

Defendants' motions were overruled by the trial court in a published opinion. *Northeastern Tel. Co. v. American Tel. & Tel. Co.*, 477 F.Supp. 251 (D.Conn., 1978) (A-1 - A-35). The case then was tried before Judge Eginton and a jury for four months in 1979. As set out in the Court of Appeals opinion:

> Northeastern's proof at the liability phase centered on the six types of conduct it alleged to be anticompetitive: pricing, advertising, marketing, introduction of new products, SNET's alleged use of its utility functions to impede competition, and appellants' design of the protective coupler. . . . The jury returned a verdict for Northeastern on all four of the claims, finding that each of appellants' six challenged activities was anticompetitive. Upon presentation of further evidence on damages, the jury awarded appellee $5,515,692.00. . . . Pursuant to § 4, of the *Clayton Act*, 15 U.S.C. § 15, the District Court ordered that the amount be trebled, to the sum of $16,547,076.00." (C-9)

The jury also found that defendant SNET possessed monopoly power in the relevant market (a finding not challenged on appeal) and had the specific intent to maintain that monopoly power. (G-1 to G-4).

After the conclusion of the trial, the defendants moved for judgment n.o.v. or, in the alternative, for a new trial. The trial judge denied the motions and awarded $747,813.38 in attorneys' fees. (B-1 to B-56).

The Court of Appeals reversed on the grounds that of the six specific areas of conduct challenged by Northeastern,

five were not anticompetitive in spite of the evidence presented and a properly charged jury's determination that the challenged behavior was intended to be anticompetitive. The Court of Appeals also effectively determined that a monopolist may seek to maintain its monopoly power through aggressive competitive behavior and that this aggressive competition is not limited to competition on the basis of the quality of the monopolist's products and services. In reaching its conclusion that Northeastern had failed in its proof, the Second Circuit ignored the jury findings on disputed facts, established a requirement of unequivocal proof, created new leeway for monopolists to crush competition and retrospectively adopted an economic standard for predatory pricing that has been rejected by this Court and courts in other circuits. More importantly, the standard adopted by the Second Circuit is peculiarly inappropriate where regulated monopolies are involved. The ultimate result of the opinion is to permit the exploitation of monopoly power, no matter how the monopoly was obtained and no matter what the intent of the monopolist, provided the acts by which the monopoly is maintained are not themselves illegal.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THE SUPREME COURT AND WITH OTHER COURTS OF APPEALS IN TWO SIGNIFICANT AREAS.

A. THE SUBSTANTIVE ELEMENTS NECESSARY TO ESTABLISH A § 2 VIOLATION; AND,

B. THE LEVEL OF PRICING WHICH CONSTITUTES PREDATORY PRICING.

Congress, in enacting § 2 of the *Sherman Act* made "it a crime for any person to monopolize or to attempt to monopolize any part of interstate or foreign trade or commerce. So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under § 2 even though it remains unexercised. For § 2 of the Act is aimed, inter alia, at the acquisition or retention of effective market control." *United States v. Griffith*, 334 U.S. 100, 106, 107 (1948). United States Supreme Court cases have continuously and consistently held that it is the willful acquisition and maintenance of monopoly power that is the specific end sought to be prevented by § 2. *American Tobacco Co. v. United States*, 328 U.S. 781, 809, 811, 814 (1946); *United States v. Swift & Co.*, 286 U.S. 106 (1932); *United States v. Griffith, supra; United States v. Grinnell Corp.*, 384 U.S. 563 (1966); see also *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir., 1945). In spite of this well recognized and clearly enunciated principle, the opinion below changes the substantive offense under § 2. While some act in furtherance of the monopoly was always necessary to complete the offense, the opinion below asserts that the willful acquisition and maintenance of monopoly power is unlawful only when coupled with certain illegal acts which the Court does not define.

Prior to the opinion below, the gravamen of a Section 2 offense was the willful acquisition or maintenance of monopoly power coupled with the purpose or intent to use it and some act or acts in furtherance thereof. Now the Second Circuit changed the inquiry to whether the acts are themselves illegal without reference to the acquisition or maintenance of monopoly power.

In *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (1979) cert. denied 444 U.S. 1093, the Second Circuit

argued that size alone is not illegal and that a competitor cannot be penalized simply because it is successful. Specifically, the Court reasoned that Kodak had acquired its monopoly position merely by manufacturing superior products. Maintenance of that power by continued development, production and sale of superior products was held not to be illegal under § 2 of the *Sherman Act*. *Berkey* constituted a dramatic variance from the previously established standards under § 2. Nevertheless, this variance is understandable in view of the obvious reluctance to trigger antitrust liability because of Kodak's improved product development. However in the present case, the Circuit Court substantially expands *Berkey*. Both Congress and this Court have outlawed the willful acquisition and maintenance of monopoly power. The Court below, nevertheless, condones monopoly power unless it is shown to have been maintained through acts which are illegal in and of themselves.

It is no answer to the serious issues raised by this case to say simply that antitrust laws were not designed to protect competitors. That does not address the issue as to whether or not competition is protected in the long run by insuring that competitors in the short run can survive and will not be crushed by a monopolist intentionally wielding its power in the relevant market. In summary, the case law of this Court and other Circuit Courts set forth the requirements of proof of a § 2 *Sherman Act* case. The opinion of the Circuit Court clearly conflicts with these well-established principles and effectively loosens the restraints of the *Sherman Act* on the monopolist's ability to dominate the market.

The second area of specific conflict between the decision below and decisions of the Supreme Court and the Courts of Appeals in other circuits relates to the issue of "predatory

pricing". Without question, pricing is a very significant element in antitrust law. Indeed, the power to control prices is one of the elements of monopoly power. Undoubtedly, pricing practices, more than any other single factor, determine the ability to "eliminate competition", the other indicia of monopoly power. Indeed, both the trial court and the Court of Appeals recognize the significance of pricing in this case.

The decision below established a measure of and a test for predatory pricing as follows:

> "Prices below reasonably anticipated marginal costs will be presumed predatory, while prices above reasonably anticipated marginal costs will be presumed non-predatory. . . . And because marginal costs cannot be determined from conventional accounting methods, we will use average variable cost as its surogate." (C-23 to C-24).

In establishing the above definition and test, the Court of Appeals created a clear conflict with both the Supreme Court and the United States Court of Appeals for the Ninth Circuit.

The Supreme Court in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 698, 699 (1967), dealing with predatory and discriminatory pricing, found a violation in a price which "was less than its direct cost plus an allocation for overhead". The Court defined such a price as a "below-cost price". (Here the trial court used the same test in arriving at defendants' liability. B-26, *infra*). In addition to *Utah Pie*, the Supreme Court has accepted the full cost approach to predatory pricing in the case of *American Commercial Lines, Inc. v. Louisville & Nashville Railroad*, 392 U.S. 571 (1968).

The Ninth Circuit's recent decision of August 7, 1981, in *William Inglis & Sons Baking Co., et al v. ITT Continental Baking Co., Inc., et al*, 652 F.2d 917 (1981), established yet another test for predatory pricing. In that case, the Court held that "if the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory". This same test was adopted in *Richter Concrete Corp. v. Hilltop Basic Resources, Inc.*, 1981-1 Trade Cases, ¶ 63,947, Page 75,877. (S.D. Ohio, 1981). See also, *In re IBM Peripheral EDP Devices Antitrust Litigation (Transamerica)* 481 F.Supp. 965 (N.D. Cal., 1979).

Likewise, in *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221 (D.C. Cir. 1980), the Court of Appeals for the District of Columbia has carefully reviewed the FCC standards for AT&T's bulk long distance rates and approved the FCC's selection of fully distributed costs as its primary pricing methodology. The Court said:

> "In the end, the FCC found that LRIC [AT&T's method of marginal cost pricing], whatever its merit in a *purely* competitive environment, should not be applied selectively to AT&T's competitive services in a manner that would burden monopoly service customers with all residual costs." (Emphasis added). 642 F.2d 1230:
>
> "The [FCC's] opinion . . . [recognizes] that when common or joint unattributable costs are carried solely by a company's monopoly customers, those customers are called upon to carry a more onerous burden than all others. This, in the Commission's terminology, may result in 'cross-subsidization', see e.g., 61 FCC 2d at 652, giving monopolists capable of loading their fixed costs entirely on monopoly customers a special advantage when they enter competitive markets." 642 F.2d 1231 n.-14."

It is clear that there is a significant conflict in the test for predatory pricing between the Second Circuit on the one hand and the Supreme Court, the Ninth Circuit and the lower courts on the other. Predatory pricing is an extremely significant element in many antitrust cases and perhaps, the most significant "overt act" in § 2 cases. The Court below has adopted an economic theory of predatory pricing developed and published by two Harvard professors, Philip Areeda and Donald F. Turner. See Areeda and Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harvard L.Rev. 697 (1975). This theoretical analysis by the two professors has been and is the subject of much controversy among both the experts and the courts (see *U.S. v. AT&T*, 1981-2, Trade Cases ¶ 64,277, pp. 74,244-74,255). Almost every pricing case by the lower courts since 1975 has discussed these theories. See for example *Richter Concrete Corp., supra*, pp. 75,884-75,888. The validity, if any, of their theory of basing predatory pricing on marginal costs (the Second Circuit opinion admits that "marginal costs cannot be determined from conventional accounting methods [C-24]") should be passed upon by this Court to establish a proper standard for predatory pricing.

The question of what constitutes predatory pricing is vitally important not only to the dominant firms in many industries but very specifically with telecommunications companies. An authoritative statement of the law having nationwide application will affect and assist the pricing decisions of major firms throughout the United States and will impact on the decision of those seeking to institute antitrust litigation based primarily on pricing practices. This Court should review the decision of the Court below to settle this issue.

At least in relevant markets where a dominant firm can subsidize below cost pricing indefinitely with revenues protected by public utility monopolies, Petitioner respectfully suggests that prices below average *total* cost should be presumed predatory (see Trial Court Opinion B-26 and *U.S. v. AT&T, supra*, pp. 74,244-74,255.)

II. THIS CASE PRESENTS AN OPPORTUNITY FOR THE SUPREME COURT TO SET FORTH A NATIONWIDE AUTHORITATIVE ANTITRUST GUIDE TO BOTH THE EXISTING TELECOMMUNICATIONS MONOPOLIES AND THEIR NEWLY ESTABLISHED COMPETITION.

This case has unusual importance because it is the first of many cases to be tried on the merits since the advent of competition in the telecommunications industry. Prior to the FCC's decision in *Carterfone, supra*, striking down the Bell System's unlawful tariff no. 263 which created Bell's monopoly, there was no competition in telecommunications. The defendants' response to competition has given rise to a plethora of antitrust cases.

While this case was the first to be tried on the merits and to have reached this level on appeal, many others are close behind. Included are *MCI Communications Corporation, et al v. AT&T*, (7th Cir. Nos. 80-2171, 80-2288, 1980), a case in which *MCI* recovered $1.8 billion at the trial court. *MCI* is presently on appeal and pending before the United States Court of Appeals for the Seventh Circuit. *United States v. American Telephone & Telegraph*, (opinion on pretrial motions at 427 F.Supp. 57 (D.D.C., 1976) cert. denied, 429 U.S. 1071 (1977); opinion on motion for directed verdict 1981-82 Trade Cases, ¶ 64,277 (D.D.C., 1981)) is pres-

ently in trial in the United States District Court for the District of Columbia. *Litton Systems, Inc. v. AT&T, et al,* (487 F.Supp. 942 S.D.N.Y., 1980) is presently on appeal before the United States Court of Appeals for the Second Circuit. *Phonetele Inc. v. ATT,* 435 F.Supp. 207 (C.D.Cal., 1977), is presently on appeal to the Ninth Circuit.

In addition to the above, there are a great number of cases which have reached the appellate courts on interlocutory appeals. Among others are the following: *Sound, Inc. v. ATT,* 631 F.2d 1324 (8th Cir., 1980); *Essential Communications Systems v. ATT,* 610 F.2d 1114 (3rd Cir., 1979). See also *Jarvis, Inc. v. ATT,* 481 F.2d 120 (D.C.D.C. (1978).

The telecommunications industry is highly regulated both by the Federal Communications Commission and by the state public utility commissions. The telecommunications companies are regulated public utilities in certain segments of their business and as such they are totally immune from competition. Other segments of the telecommunications companies business are subject to competition. Finally, some aspects of the business are subject to both regulation and competition. This Court has never clearly expressed the degree to which a regulated monpolist's behavior in competitive markets is controlled by the *Sherman Act.* Both new entrants into the telecommunications field and the existing telecommunications monopolists have an imperative need to know the limits of competitive activities and the legality of particular responses to competition. This need is imperative for business planning purposes as well as for antitrust evaluation purposes.

Unless the antitrust laws provide short term protection for new entrants, competition in newly opened fields such

as the business telephone equipment market may not be possible. On the other hand, if telecommunications common carriers, under the blanket approval of the Second Circuit's opinion, are able to abuse the enormous market power created by their public utility status and by virtue of unlawful tariffs giving them 100% of the relevant market, then attempting to enter the relevant market becomes futile. This was demonstrated vividly when the testimony disclosed "the inability of a high percentage of interconnect companies to survive in the Connecticut markets . . ." (B-23).

This case is an important Section 2 case for areas other than telecommunications. The Court of Appeals decision in this case announced dramatic new antitrust law and, indeed, significantly changed the law in many respects. A striking example of this is the fact that after years and years of litigation between the Department of Justice Antitrust Division and IBM, when the Second Circuit's decision in this case was announced, the parties commenced new rounds of settlement discussions based upon the opinion. (E-1 to E-3).

III. BY SUBSTITUTING ITS VIEW OF THE EVIDENCE FOR THE JURY'S FINDINGS AND REQUIRING UNEQUIVOCAL PROOF FROM THE PLAINTIFF, THE SECOND CIRCUIT'S OPINION EFFECTIVELY DENIED THE PLAINTIFF A RIGHT TO A JURY TRIAL AND SET DANGEROUS PRECEDENT FOR OTHER ANTITRUST LITIGANTS.

After the properly charged jury in this case determined that the challenged actions of the Defendants were anti-competitive acts designed to smother competition, the Court of Appeals found that five out of six of such acts were nothing more than normal competitive activity and reversed

the case based upon the Court's findings. The questions presented to the jury were clearly questions of fact and not legal questions. The questions related in large part to the intentions of the defendants in carrying out the challenged actions. See the applicable sections of the Court's Charge at F-1 to F-14.

On the liability phase of the trial, the jury heard some 21 days of testimony dealing almost entirely with the predatory conduct of the defendants. The evidence and the court's charge left the jury with two choices: was the challenged action of the defendants normal competitive activity in which the defendants sought to win the competitive struggle through superior skill, products and business acumen, or, was the action anticompetitive and predatory and carried out with the intent to willfully maintain and exploit monopoly power? The jury, having the benefit of hearing all of the testimony and proof and having the opportunity to observe the demeanor of the witnesses, decided the issue in favor of the plaintiff. With no basis for judging the credibility of the witnesses and ignoring the fact that there was conflicting evidence, the Second Circuit made its own fact determination and effectively denied the plaintiff the right to a jury trial.

The Supreme Court has held that blithely setting aside jury verdicts by appellate courts amounts to a curtailment of the right to a jury trial and will not be tolerated. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); *Lavender v. Kurn*, 327 U.S. 645 (1946); *Meyers v. Reading Co.*, 331 U.S. 477 (1947).

The issue of the proper function and propriety of juries in civil antitrust cases is an extremely important question and should be authoritatively answered by the Supreme

Court. Parties contemplating antitrust litigation and preparing for trial have a need to know the answer to these questions. Citizens should not be subjected to the expense and inconvenience of protracted jury service in cases such as this if their conscientious determinations and findings are to be summarily eradicated by appellate judges who do not have the benefit of evaluating the live testimony and do not have a basis for judging credibility. See the dissenting opinion of Mr. Justice Renquist joined by Mr. Justice Powell in the action of the Court in denying certiorari in *Berkey Photo, Inc. v. Eastman Kodak*, 444 U.S. 1093, 62 L.Ed.2d 783, 100 S.Ct. 1061 (1980).

CONCLUSION

With the entry of the decision and opinion of the Court of Appeals in this case, there now exists a conflict between the various courts of the United States with respect to the substantive elements of a Section 2 offense under the *Sherman Act*. (15 U.S.C. § 2). There is also a conflict among the various courts of the United States with respect to what constitutes a "predatory price" within the meaning of the antitrust laws.

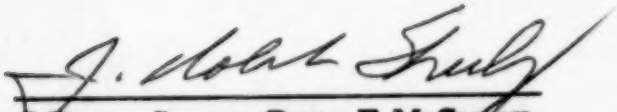
There is an urgent need for a nationally authoritative statement of the law with regard to the application of the antitrust laws to the telecommunications industry where competition has been introduced with many new companies attempting entry with extreme response from the existing monopolists.

In summary, the Circuit Court has reversed this case in spite of existing case law under Section 2, the conflict with other Circuits on predatory pricing and the jury's findings

made under a proper charge of the Court. This case is of major public importance and should be reviewed by this Court.

For the above reasons, Petitioner respectfully requests that its Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit be granted.

Respectfully submitted,



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APPENDIX

NORTHEASTERN TELEPHONE COMPANY,
Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., and the SOUTHERN NEW ENGLAND TELEPHONE COMPANY,
Defendants.

Civ. No. B-75-319

United States District Court
D. Connecticut

November 30, 1978

Seller of telephone terminal equipment in Connecticut brought action against telephone company selling telephone terminal equipment, manufacturer of equipment and others claiming that defendant had monopolized and attempted and conspired to monopolize and restrain trade in Connecticut business terminal equipment market in violation of the Sherman Antitrust Act, in violation of Connecticut Antitrust Act and sought injunction and treble damages and defendants moved to dismiss claiming immunity from antitrust laws. The District Court, Daly, J., held that: (1) neither regulatory framework of the Communications Act of 1934 nor particular efforts by the Commission in regulation of telephone interconnection equipment extended immunity to telephone company for damages allegedly resulting from contracts related to design of protective telephone interconnection equipment prior to effective date of Commission's registration program for such equipment; (2)

challenged activities were not within state-action exemptions to the Sherman Act; and (3) question of possible application of Connecticut Antitrust Act was proper subject for abstention.

Motion to dismiss granted in part and denied in part.

1. Telecommunications — 1

Under standard mandated by Communications Act to govern Federal Communications Commission regulation of telecommunication, i.e., that of the "public interest," competition is only one of numerous factors that the Commission must consider and may not be looked upon as an end in itself. Communications Act of 1934, § 201(b) as amended 47 U.S.C.A. § 201(b).

2. Monopolies — 12(16)

Regulation by the Federal Communications Commission does not give rise to blanket immunity of regulated activities from antitrust laws expressly or by implication. Communications Act of 1934, § 1 et seq. as amended 47 U.S.C.A. § 151 et seq.

3. Monopolies — 12(16)

As a general rule, immunity from antitrust laws is implied only in cases of plain repugnancy between regulatory provisions and the antitrust laws and an immunity will be recognized only when necessary to make regulatory statutes work, and even then only to minimum extent necessary.

4. Monopolies — 12(16)

Neither the regulatory framework of the Communications Act of 1934 nor particular regulatory efforts by the Federal

Communications Commission in regulation of telephone interconnection equipment extended an immunity to telephone company for damages allegedly resulting from contracts related to design of protected telephone interconnections equipment prior to effective date of Commission's registration programs for such equipment. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2; Clayton Act, §§ 4, 16, 15 U.S.C.A. §§ 15, 26; Communications Act of 1934, § 1 et seq. as amended 47 U.S.C.A. § 151 et seq.

5. Monopolies — 12(16)

Challenged activities of telephone company in marketing of Connecticut business terminal equipment were not within state-action exemption to the Sherman Act. Communications Act of 1934, §§ 1 et seq. as amended 47 U.S.C.A. § 151 et seq.; Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.

6. Monopolies — 28(6.2)

Portion of telephone terminal equipment seller's complaint addressed to competing telephone company's efforts to establish a moratorium on interconnect competition stated a cause of action, and in absence of duty of telephone company to specify in complaint exact conduct supporting its claim, claim would not be dismissed due to First Amendment protection of political efforts. Sherman Anti-Trust Act, § 1 et seq., 15 U.S.C.A. § 1 et seq.; U.S.C.A. Const. Amend. 1.

7. States — 4.10

Connecticut Antitrust Act, as applied to challenged activities of sellers of telephone terminal equipment, was not preempted by regulation of the Federal Communications Commission. C.G.S.A. § 35-24 et seq.

8. Federal Courts — 50

Question of possible application of Connecticut Antitrust Act to marketing and sale of telephone terminal equipment in Connecticut was proper subject for federal abstention. C.G.S.A. § 35-24 et seq.

J. Daniel Sagarin, Schless & Sagarin, Bridgeport, Conn., Philip E. McCleery, pro hac vice, J. Robert Sheehy, pro hac vice, Sheehy, Lovelace & Mayfield, Waco, Tex., for plaintiff.

Marshall R. Collins, Asst. Atty. Gen., Hartford, Conn., for amicus curiae.

John M. Goodman, Leonard Joseph, J. Paul McGrath, Dewey, Ballantine, Bushby, Palmer & Wood, New York City, Lewis H. Ulman and Peter J. Tyrrell, William J. O'Keefe, Anne U. MacClintock, Southern New England Telephone Co., New Haven, Conn., William R. Moller, Moller & Horton, Hartford, Conn., Burton K. Katkin, New York City, for defendants.

RULING ON MOTIONS TO DISMISS

DALY, District Judge.

This case arises from the involvement of a regulated telephone utility monopoly in the business terminal equipment market made competitive as the result of the *Carterfone*[1] decision of the Federal Communications Commission

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[1] *Use of Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420, *reconsideration denied*, 14 F.C.C.2d 571 (1968). *See also Carter v. American Tel. & Tel. Co.*, 365 F.2d 486 (5th Cir. 1966), *cert. denied*, 385 U.S. 1008, 87 S.Ct. 714, 17 L.Ed.2d 546 (1967); *Hush-A-Phone Corp. v. United States*, 99 U.S.App.D.C. 190, 193, 238 F.2d 266, 269 (1956).

("FCC" or "the Commission"). Plaintiff Northeastern Telephone Company ("Northeastern") sells telephone terminal equipment to customers in Connecticut. This equipment is installed on the customer's premises and connected to the public telephone lines. The defendant Southern New England Telephone Company ("SNET"), owned in part by defendant American Telephone & Telegraph Company also markets terminal equipment, which is manufactured by the defendant Western Electric Company, and which is subject to the supervision of the FCC and the Connecticut Public Utilities Control Authority ("PUCA" or "the Authority"). See Conn. Gen.Stat. § 16-1 (1977). Northeastern has brought this action alleging that the defendants have monopolized, and have attempted and conspired to monopolize and restrain trade in the Connecticut business terminal equipment market in violation of sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, and in violation of the Connecticut Antitrust Act, Conn.Gen.Stat. §§ 35-26 to 28, 35-35. The request for relief includes an injunction and treble damages under sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26. The defendants have moved to dismiss claiming immunity from antitrust laws on the basis of pervasive federal and state regulation, and also arguing that the challenged activities are within the state-action exception to the Sherman Act. See *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1942). The defendants also assert that certain activities challenged in the complaint are protected by the First Amendment. Finally, the defendants argue that the Connecticut Antitrust Act is inapplicable.

I.

IMPLIED ANTITRUST IMMUNITY DUE TO FEDERAL REGULATION.

FCC REGULATION

Congress articulated a broad mandate for the FCC in the Communications Act: "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges. . . ." 47 U.S.C. § 151. The FCC's primary tool for regulating telecommunications common carriers is the tariff, a formal schedule of a carrier's charges, classifications, regulations and practices required to be filed with the Commission before conducting business. 47 U.S.C. § 203(a). All unjust or unreasonable tariffs are unlawful, § 201(b), as is unjust or unreasonable discrimination in tariffs. § 202(a). The Commission may, at its own initiative or upon complaint of an interested party, hold hearings as to the lawfulness of any new tariff and suspend its effective date. If the investigation has not been completed within five months past the original effective date,[2] the tariff becomes operative pending a determination of its lawfulness. § 204(a). If the FCC upon completion of the investigation concludes that the scrutinized activity violates the Act, the Commission may issue cease-and-desist orders or require the carrier to adopt prescribed rates and practices. § 205(a). Once the tariffs become effective, the common carriers must conform to them. § 203(c).

In addition to examining tariffs, the FCC may also establish rules and regulations "necessary in the public interest"

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[2]The five month period was established by Congress in 1976. Pub.L. 94-376, § 2, 90 Stat. 1080. Prior to that time, the maximum period of delay for investigation was 90 days.

to carry out its statutory duties. § 201(b). The carriers themselves are under a duty "to furnish such communication service upon reasonable request." § 201(a). Also, the FCC must "keep itself informed . . . as to technical developments and improvements in wire . . . communication . . . to the end that the benefits of new inventions and developments may be made available to the people of the United States." § 218.

The Communications Act is not without sanctions for unlawful conduct by the carriers. The failure to obey an FCC order will result in a fine of $1,000 for every violation, to be levied each day against continuing offenses. § 205(b). A carrier is also liable to persons injured by conduct in violation of the Act for the "full amount of damages sustained . . . together with a reasonable counsel or attorney's fee." § 206, §§ 207-209.

[1] The standard mandated by the Communications Act to govern FCC regulation of telecommunications common carriers is the "public interest." § 201(b). Although Congress has not explicitly directed the FCC to consider competition as a factor, the FCC clearly includes competitive concerns in its decision-making process. However, competition is only one of numerous factors that the Commission must consider, and may not be looked upon as an end in itself. *E. g., FCC v. RCA Communications, Inc.*, 346 U.S. 86, 94, 73 S.Ct. 998, 97 L.Ed. 1470 (1953); *Hawaiian Telephone Co. v. FCC*, 162 U.S.App.D.C. 229, 235, 498 F.2d 771, 777 (1974); *Satellite Business Systems*, 62 F.C.C.2d 997, 1070 (1977).

Prior to 1968, many telephone companies would permit only company-provided telephone equipment to be attached to their telephone lines. This practice, embodied in both state and federal tariffs, resulted in a telephone equipment

monopoly, and aided the states in redistributing the cost of telephone services by setting equipment prices at levels related only indirectly to cost. In *Use of Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420, *reconsideration denied*, 14 F.C.C.2d 571 (1968), the FCC embarked upon a major reform of telephone interconnection. In that decision, the FCC found that the complete prohibition against interconnection of customer-owned equipment was unreasonable and unlawful because it was done without regard to whether interconnection would "adversely affect the telephone company's operation or the telephone system's utility for others." 13 F.C.C.2d at 424. Furthermore, the FCC found the complete exclusion unreasonably discriminatory because only the telephone company's equipment could be connected. *Id.* That portion of the tariff incorporating the interconnection prohibition was therefore stricken.

The *Carterfone* decision left to the companies the task of accommodating the traditional need to protect the safety and effectiveness of the telephone lines with the new requirement of liberalized customer interconnection. In November 1968, defendant AT&T filed a new tariff allowing interconnection for the most part only through a company-provided protective device. In response, the FCC allowed the new tariff to become effective while explicitly reserving decision on its lawfulness. *AT&T "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 610 (1968), *reconsideration denied*, 18 F.C.C.2d 871 (1969). The FCC then embarked upon an extensive investigation of the interconnection question, commissioning a study by the National Academy of Sciences and commencing an informal investigation of its own.

In 1972, the year that plaintiff Northeastern entered the Connecticut terminal equipment market, the FCC convened

a joint federal and state board to investigate interconnection. By 1974, however, the spectre of conflicting standards established by the various state regulatory agencies prompted the FCC to assert "paramount jurisdiction" over the technical standards for all interconnection equipment. *Telerent Leasing Corp.*, 45 F.C.C.2d 204 (1974), *aff'd sub nom. North Carolina Util. Comm'n v. FCC*, 537 F.2d 787 (4th Cir. 1976), *cert. denied*, 429 U.S. 1027, 97 S.Ct. 651, 50 L.Ed.2d 631 (1976).

The present complaint was filed in October of 1975. In November of that year, the FCC promulgated a registration program for interconnect equipment, and directed telephone companies to permit direct interconnection of all equipment that met the Commission's criteria. Direct interconnection was also required for equipment that included a protective device that similarly met the Commission's criteria. Otherwise, the telephone company could still require the customer to use a company-provided protective device just as the post-*Carterfone* tariffs had required. *Interstate and Foreign MTS and WATS*, 56 F.C.C.2d 593 (1975), *modified*, 58 F.C.C.2d 736 (1976), *aff'd sub nom. North Carolina Util Comm'n v. FCC* 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874, 98 S.Ct. 222, L.Ed.2d 154 (1977). *See* 47 C.F.R. § 68 (1976). The FCC found that the carriers had failed to "propose effective procedures and/or tariff conditions to prevent harm without unduly restricting a customer's right to make reasonable use of the facilities furnished by the carriers." 56 F.C.C.2d at 598. Accordingly, the Commission declared the post-*Carterfone* tariffs to be an unnecessary interference with a customer's right to make reasonable use of the telephone lines, and an unjust and unreasonable discrimination against certain users and suppliers of terminal equipment. *Id.*

IMPLIED IMMUNITY

[2] The Communications Act of 1934 does not include an explicit, general exemption of FCC regulated activities from the antitrust laws; therefore the issue becomes one of implied immunity.[3] It is also clear that regulation by the FCC does not give rise to a blanket immunity by implication.[4] *United States v. American Tel. and Tel. Co.*, 427 F.Supp. 57, 61 (D.D.C.1976), *cert. denied*, 429 U.S. 1071, 97 S.Ct. 824, 50 L.Ed.2d 799 (1977). Therefore a claim of immunity must focus on the type of activity challenged[5] — the design of

[3]The Act does provide a narrow exemption for telephone company consolidations and acquisitions approved by the FCC. 47 U.S.C. §§ 221(a), 222(c)(1). Nevertheless, the inclusion of specific exemptions from the antitrust laws neither precludes other implied exemptions, *e. g., Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963); *Terminal Warehouse Co. v. Pennsylvania R. Co.* 297 U.S. 500, 56 S.Ct. 546, 80 L.Ed. 827 (1963), nor necessarily supports a broader immunity, *e. g., California v. Federal Power Comm'n*, 369 U.S. 482, 485, 82 S.Ct. 901, 8 L.Ed.2d 54 (1962); *United States v. Borden Co.*, 308 U.S. 188, 198-202, 60 S.Ct. 182, 84 L.Ed. 181 (1939). These explicit immunity provisions of the Communications Act do not suggest a blanket exemption, *Industrial Commun. Systems, Inc. v. Pacific Tel. & Tel. Co.*, 505 F.2d 152, 156 (9th Cir. 1974), nor do they necessarily constitute the only exemptions available. *International Tel. & Tel. Co. v. General Tel. & Elec. Corp.*, 518 F.2d 913, 918-19 (9th Cir. 1975).

[4]Indeed, a blanket immunity from the antitrust laws due to the existence of a regulatory scheme may require "an unequivocally declared purpose" on the part of Congress. *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 304-305, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963). *See Hughes Tool Co. v. Trans World Airline, Inc.*, 409 U.S. 363, 387, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973).

[5]This portion of the opinion focuses exclusively upon federally regulated conduct, although defendants throughout their papers refer to both federal and state regulation in support of their immunity argument based upon "pervasive" regulation. Their immunity theory is derived from various Supreme Court decisions accommodating the antitrust laws with exclusively federal regulation. The need for antitrust immunity arises in those cases because of the conflict between two congressional schemes of equal status. State regulation, however, has a status inferior to federal enactments, and thus be-

(Continued on next page)

interconnect equipment — keeping in mind that implied repeal is not favored.[8] *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 348, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963).

The plaintiff's complaint is sparsely worded. The portion related to the areas of federal regulation described above refers primarily to discrimination in services and the designing of interconnect equipment to hinder competition. Thus the complaint raises a retrospective challenge to the post-*Carterfone* tariffs initiated by the defendants and which remained in effect until the establishment of the FCC's registration program for interconnection equipment. As noted earlier, these tariffs became effective without the explicit approval of the FCC, and were later ruled violative of the Communications Act. Plaintiff's brief in opposition to the Motion to Dismiss explained that Northeastern was not challenging the tariff. But the plaintiff argued later in its brief that application of the Sherman Act to the post-*Carterfone* tariffs would advance the principles of the antitrust laws while vindicating the Commission's policies under the

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comes the victim of federal preemption under the Supremacy Clause. State regulation is relevant to limitations upon the sweep of the federal antitrust laws only in the manner discussed in the succeeding section of this opinion dealing with the state action exception under *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1942), and its progeny.

[8] Other district courts have split on the immunity question. Most have favored immunity, *see Selectron, Inc. v. Pacific Northwest Bell Tel. Co.*, Civil No. 76-965-BE (D. Ore. June 19, 1978); *Monitor Bus. Machines, Inc. v. American Tel. & Tel. Co.*, 1978-1 CCH Trade Regulation Rep. ¶ 62,030 (C.D.Cal. 1978); *Essential Communication Systems, Inc. v. American Tel. & Tel. Co.*, 446 F.Supp. 1090 (D.N.J.1978); *DASA Corp. v. General Tel. Co.*, 1977-2 CCH Trade Regulation Rep. ¶ 61,610 (C.D.Cal. 1977); *Phonetele, Inc. v. American Tel. & Tel. Co.*, 435 F.Supp. 207 (C.D.Cal. 1977). Only two decisions have held to the contrary. *See Jarvis, Inc. v. American Tel. & Tel. Co.*, Civil No. 74-1674 (D.D.C. Aug. 7, 1978); *Macom Products Corp. v. American Tel. & Tel. Co.*, 359 F.Supp. 973 (C.D.Calif. 1973).

Communications Act. In response to this Court's request for a clarification of the plaintiff's position, Northeastern explained that it did not intend to challenge the "validity" of the pre-registration tariff or the connecting arrangement requirement of that tariff. Rather, plaintiff stated that it was challenging the specifics of the connecting arrangement, *i. e.*, the requirement of a 110-volt external power source and an interface device necessitating a four-wire, instead of a two-wire outlet.

This distinction based upon the specificity of the particular interconnection conduct challenged appears at first glance to have some relevance to this immunity debate. As the preceding summary of the regulatory background indicates, the FCC in *Carterfone* did not explicitly mandate any particular design for accomodating the public's right to increased access and the need to protect the safety and effectiveness of the telephone network. It should also be noted, however, that the widespread requirement of an interconnection device supplied by AT&T was itself similarly not required. In addition, the public policy behind liberalized interconnection and the means chosen to serve that policy given the available technology are so closely intertwined that the question whether the federal courts and the FCC are to share direct oversight responsibilities, or the FCC is to govern such conduct exclusively, remains the same regardless of the specificity of the interconnection conduct challenged. *See United States v. National Association of Securities Dealers*, 422 U.S. 694, 733, 95 S.Ct. 2427, 45 L.Ed.2d 486 (1975) ("NASD"); *Hughes Tool Co. v. Trans World Airlines*, 409 U.S. 363, 379, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973).

[3] Defendants argue that the conduct mentioned in the complaint is immune because of pervasive regulation under a

public interest standard that makes application of the "unidimensional" federal antitrust laws inappropriate. As a general rule, immunity is implied only in cases of "plain repugnancy" between the regulatory provisions and the antitrust laws. And an immunity will be recognized only when necessary to make the regulatory statutes work, and even then only to the minimum extent necessary. *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 682-83, 95 S.Ct. 2598, 45 L.Ed.2d 463 (1975); *United States v. Philadelphia Nat'l Bank*, supra 374 U.S. at 350-51, 83 S.Ct. 1715 (1963); *Silver v. New York Stock Exchange*, 373 U.S. 341, 357-58, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963). These widely repeated refrains, however, are of limited value in application. The issue in most cases is whether immunity is necessary to the regulatory body's ability to exercise its statutory mandate.'

'The issue is not whether immunity is necessary to meet the goals of the regulatory program, *i. e.*, whether the challenged practice is necessary to protect the public interest although clearly constituting a violation of the antitrust laws. Thus, plaintiff's argument that the general goals of the Communications Act are consistent with those of the Sherman Act is misfocused. As the Court majority explained in *Gordon v. NYSE*, *supra* 422 U.S. at 688, 95 S.Ct. at 2614.

> [o]n the one hand, there is a factual question as to whether fixed commission rates are actually necessary to the operation of the exchanges as contemplated under the Securities Exchange Act. On the other hand, there is a legal question as to whether allowance of an antitrust suit would conflict with the operation of the regulatory scheme which specifically authorizes the SEC to oversee the fixing of commission rates. The factual question is not before us in this case. Rather, we are concerned with whether antitrust immunity, as a matter of law, must be implied in order to permit the Exchange Act to function as envisioned by Congress. The issue of the wisdom of fixed rates becomes relevant only where it is determined that there is no antitrust immunity.

Justices Stewart and Brennan disagreed, declaring that the inconsistency required to support a finding of immunity must be one that threatens the "aims of the regulatory framework." *Id.* at 658, 95 S.Ct. 2427. (Stewart and Brennan, JJ., concurring) (quoting *Silver v. NYSE*, *supra* 373 U.S. at 361, 83 S.Ct. 1246).

With regard to immunity inferred from pervasive regulation, the Supreme Court has mentioned two rationales: whether "federal regulation ... is so comprehensive that enforcement of the antitrust laws would be either *unnecessary*, in light of the completeness of the regulatory structure, or *disruptive* of that structure." *United States v. Philadelphia National Bank*, 374 U.S. *supra* at 352, 83 S.Ct. at 1735. (Emphasis added).[8] The inquiry must focus on both the legislative framework and the actual role played by the regulatory agency.

In support of their immunity theory, defendants rely primarily on two 1975 Supreme Court cases, *Gordon v. New York Stock Exchange*, *supra*, and *United States v. NASD*, *supra*. In *Gordon*, the Supreme Court rejected an antitrust challenge to the fixed commission rates of the New York Stock Exchange, in part because the SEC had been actively investigating the practice of fixed commissions. These investigations paralleled somewhat the FCC proceedings regarding interconnection. The Court also concluded, however, that § 19(b) (9) of the Securities Exchange Act of 1934 appeared explicitly to authorize the "fixing" of rates, normally a *per se* violation of the antitrust laws, subject only to the supervision of the Securities and Exchange Commission. The Court reasoned that Congress, having given the SEC authority to regulate fixed rates, must have intended such rates to be legal absent SEC disapproval. Otherwise, the authority granted the SEC to approve fixed rates would be negated by the antitrust laws, and the authority to disapprove fixed rates

[8] The Supreme Court on a number of occasions has described public utility or common carrier regulation as pervasive. *See Otter Tail Power Co., v. United States*, 410 U.S. 366, 377, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973); *United States v. Philadelphia Nat'l Bank*, *supra* at 352; *United States v. Radio Corp. of Am.*, 358 U.S. 334, 339-346, 79 S.Ct. 457, 3 L.Ed.2d 354 (1959).

would be superfluous. Finally, the Court cited as significant to the immunity issue recent legislation affirming its view of congressional intent. In contrast, the Communications Act includes no such approval[9] of anticompetitive interconnection practices and defendants have not directed this Court's attention to any recent legislation corroborating their exclusive jurisdiction claim.

A similar distinction may be drawn between this case and *United States v. NASD*, *supra*, in which the Supreme Court considered the applicability of the Sherman Act to certain vertical restraints used by mutual funds to limit a secondary market in their shares. Absent immunity, such restraints would have constituted refusals to deal—again *per se* violations of the antitrust laws. The Court recognized an immunity defense because § 22(f) of the Investment Company Act of 1940, 15 U.S.C. § 80a-22(f), was looked upon as a clear congressional authorization of vertical restrictions upon the sale of mutual fund shares, so long as the restrictions were included in the registration statements and were not prohibited by SEC rules or regulations.[10] Once again, there is no equivalent congressional endorsement of anticompetitive interconnection practices found in the Communications Act.

Of potentially greater persuasiveness is the Supreme Court's treatment of the alleged interdealer horizontal conspiracy in *NASD*. Because the restraints were not authorized

[9] The absence of such an approval may be due to the lack of available technology or a recognizable interconnect market in 1934. Nevertheless, *Gordon* is less persuasive as a result.

[10] The vertical restraints attacked in the complaint were "the kinds of restrictions Congress contemplated when it enacted that section. And this conclusion necessarily leads to a determination that they are immune from liability under the Sherman Act, for we see no way to reconcile the Commission's power to authorize these restrictions with the competing mandate of the antitrust laws." *United States v. NASD*, *supra* at 721-22, 95 S.Ct. at 2444.

by Congress, and thus were ineligible for the same immunity conferred upon the mutual funds, the Court went on to consider whether the SEC's exercise of authority over the rules and practices of the NASD was "sufficiently pervasive to confer an implied immunity." *Id.* 422 U.S. at 730, 95 S.Ct. at 2448. In relation to the SEC's regulation of the NASD, the Court found the pervasiveness sufficient to imply an immunity. The SEC's authority over the rules of the NASD is similar to that of the FCC over the tariffed activities of telecommunications common carriers. Both commissions must consider the interest of the general public, and each considers an inquiry into the public interest to include an examination of the potential benefits of competition as well as other factors. However, the regulatory frameworks also differ significantly.

First, the Maloney Act requires that before a securities association will be approved by the SEC it must have established rules designed to "remove impediments to and perfect the mechanism of a free and open market." 15 U.S.C. § 78o-3(b)(6). The Communications Act does not include such an explicit delegation of competitive supervision.[11] More impor-

[11]It has been argued that the lack of competitive criteria in the Communications Act should not be seen as an indication that Congress did not intend the FCC to supplant the antitrust laws. Note *AT&T and the Antitrust Laws: A Strict Test for Implied Immunity*, 85 Yale L.J. 254, 263 n. 44 (1975). *But cf. Otter Tail Power Co. v. United States*, *supra* 410 U.S. at 372-75, 93 S.Ct. 1022; *United States v. NASD*, *supra* 422 U.S. at 743, 95 S.Ct. 2427 (White, J., dissenting). The reason given is that competition standards made sense only in those regulated industries in which competition still existed to a significant extent. The telephone industry, however, was conceded by Congress to be a monopoly. *See e. g.*, S.Rep.No. 781, 73d Cong.2d Sess. 2 (1934). To require explicit competitive standards, according to one author, "would have the anomalous result of displacing the antitrust laws in indus-

(Continued on next page)

tantly, the SEC oversight is mandatory and narrowly focused, while the FCC regulation is discretionary and its area of exercise sweeping. The NASD rules *must* be approved before the association may register, and the SEC *must* disapprove all subsequent changes if they conflict with the Act's criteria. 15 U.S.C. § 78o-3(j). The Maloney Act thus guarantees that the NASD rules will be scrutinized for their compatibility with the public interest in competition and the mere existence of a rule represents an agency policy decision.[12] This close supervision by the SEC makes application of the antitrust laws unnecessary, and makes a conflict between the courts and the Commission inevitable if an antitrust plaintiff is to succeed. In contrast, tariffs may become effective upon

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tries where Congress felt the competitive ideal was still very important and retaining their applicability in industries where Congress felt competition should not play a significant role." Note, *AT&T and the Antitrust Laws: A Strict Test for Implied Immunity*, *supra*. Although the failure of Congress explicitly to bestow upon the FCC the duty of preserving competition where beneficial to the public may not justify an inference that Congress intended both acts to operate simultaneously, the absence of standards certainly weakens the analogy to those cases in which the Court found such criteria significant.

[12] In *NASD*, the Court noted that "the broad regulatory authority conferred upon the SEC by the Maloney and Investment Company Acts enables it to monitor the activities... and the history of Commission regulations suggests no laxity in the exercise of this authority." *Id.* at 734, 95 S.Ct. at 2450. The Court was referring, in part, to the SEC's control over NASD rules, a control which, as discussed above, must be exercised before the rules become effective, and which is guided by criteria that explicitly include competition.

As to the challenged ancillary activities intended to frustrate the secondary market in mutual fund shares, the Court noted also that "to the extent [these] activities [might] frustrate the SEC's regulatory objectives it has ample authority to eliminate them." *Id.* This statement could be interpreted as a rule of implied immunity based on the regulatory agency's power to prevent or halt antitrust violations. And *NASD* has been interpreted by some as following, if not explicitly articulating, a rule that recognizes an

(Continued on next page)

the mere acquiesence of the FCC, and must become effective if the FCC has not ruled them unlawful within five months of the proposed effective date. The Communications Act thus includes no such assurance of regulatory review, and the enactment of a tariff does not necessarily represent a potential conflict with the antitrust laws.

The importance of review of competitive impact by the agency prior to the challenged conduct can be seen in the cases concerning the relationship between the antitrust laws and the Civil Aeronautics Board ("CAB"). In *Pan American World Airways, Inc. v. United States*, 371 U.S. 296, 83 S.Ct. 476, 9 L.Ed.2d 325 (1963), the Court was asked to enjoin under the Sherman Act certain efforts at territorial restraints by the defendant airline. In finding an immunity the Court examined the statutory framework, which included an explicit delegation of supervisory authority over questions of monopoly and competition. *See* 49 U.S.C. §§ 1302, 1381. The Communications Act includes no such explicit competitive

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immunity whenever an agency has jurisdiction over the activity and the authority to correct the problem. *See, e. g.*, Sherman, *The Application of the Antitrust Laws to Regulated Industries*, 44 Tenn. L. Rev. 1, 25 (1976); *The Supreme Court 1974 Term*, 89 Harv.L. Rev. 47, 211 (1975).

However, the Court's recognition of immunity for the ancillary activities was based primarily on the already established exclusive authority of the SEC under § 22(f) of the Investment Company Act to regulate vertical restraints imposed by the funds themselves. The Court saw an antitrust injunction against activity by NASD members to suppress intrafund secondary market activities as potentially contrary to the SEC's policy of restricting the secondary market. This "close relationship" betwen the goals of the ancillary activity and the aims of the SEC was "fatal to the Government's complaint." 422 U.S. at 733, 95 S.Ct. 2427. Accordingly, the Court noted that "the Government does not contend that appellee's activities have had the purpose or effect of restraining competition among the various funds." *Id.* 95 S.Ct. at 2449. Had the Government alleged a conspiracy restricting interfund competition, the result might have been different, although the regulatory levers would have been the same. *See id.* at 734 n. 46, 95 S.Ct. 2426.

criteria. Furthermore, the challenged conduct involved the division of routes, a matter at the heart of the CAB authority; no route was permitted without the granting of a certificate by the authority. § 1401. The suit also included a challenge to the close relationship between Pan Am and another common carrier. The statute normally required prior study and approval by the CAB before that type of relationship could be established. § 1408.

In *Hughes Tool Co. v. Trans World Airlines, Inc., supra,* the Court again considered the question of antitrust immunity for CAB regulated activities. Trans World Airlines ("TWA") sued the Hughes Tool Company ("Toolco") for injuries allegedly incurred as a result of Toolco's control of TWA's acquisition and financing of aircraft. Again, the Court attributed substantial significance to the statutory criteria referring specifically to competition and monopoly power. *Id.* 409 at 385, 93 S.Ct. 647. Of particular importance here, the Court's finding of immunity was based on § 408 of the Federal Aviation Act, which required *prior approval* by the CAB of Toolco's acquisition of TWA, and under which the CAB had continued to exercise prior review of subsequent conduct.[18]

The *Pan Am* and *Hughes* decisions, as well as the Supreme Court's discussion of pervasive regulation in *NASD,* make clear that the statutory framework found significant in those cases has no counterpart in the Communications Act of 1934 that would justify an inference of immunity. There is no explicit congressional mandate that the FCC consider

[18] In *Hughes,* the Supreme Court strongly implied that had the challenged conduct not been subject to agency direction or agreement, there would have been no immunity. 409 U.S. at 385-86 n.14, 93 S.Ct. 647, *quoting United States v. Borden,* 308 U.S. 188, 200, 60 S.Ct. 182, 84 L.Ed. 181 (1939).

competition. More importantly, the Act permits tariffs to become effective without the exercise of agency judgment as to their lawfulness, and requires that they become effective if the FCC has not reached a decision within five months. Thus policy judgments need not precede the possibly anticompetitive conduct. The supervisory role for the FCC established in the Communications Act would thus appear to be too general and potentially passive to support an implied immunity for the challenged conduct of the defendants.[14]

Having decided that the statutory framework does not require an inference of immunity, the question becomes whether the particular regulatory activity of the FCC during the period between the *Carterfone* decision and the promulgation of the registration program for interconnect equip-

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[14] In *Phonetele, Inc. v. American Tel. & Tel. Co.*, 435 F.Supp. 207 (C.D.Cal.1977), the court held that the defendant's conduct pursuant to the post-*Carterfone* tariffs was immune from antitrust scrutiny because, *inter alia*, the sanctions available to the FCC in enforcing the Communications Act were similar to those available to the courts under the antitrust laws. However, the regulatory limitation to actual damages fails to provide the strong deterrent to anticompetitive behavior established by Congress through the treble damage provision of the antitrust laws.

In addition, the available administrative remedies must be examined in the context of the particular actions alleged in the complaint. Although the Communications Act does provide a damage remedy, the range of conduct prohibited is far narrower than that of the antitrust laws. For example, in the present suit the plaintiff alleges both attempt and conspiracy, neither of which is covered by the Act. *Cf. Terminal Warehouse Co. v. Pennsylvania R. Co.*, 297 U.S. 500, 516, 56 S.Ct. 546, 80 L.Ed. 827 (1963).

The right to sue for damages under the antitrust laws in the present case does not necessarily mean that a plaintiff may resort to both the agency damage procedure and the antitrust courts. It may be that the plaintiff must choose between the two avenues. *See Carnation Co. v. Pacific Conference, Inc.*, 383 U.S. 213, 224, 86 S.Ct. 781, 15 L.Ed.2d 709 (1966). The plaintiff has not attempted to utilize the FCC damage remedy, thus the right to seek treble damages is clearly available.

ment should change the result. In *Carterfone*, the Commission merely ruled the earlier tariffs unlawful. The FCC neither ordered nor approved the specific replacement tariffs. Thus the defendant's analogy to *Hughes* must fail, because in that case the Supreme Court found that the challenged activity by Toolco was precisely that type of control approved on numerous occasions by the CAB. Indeed, as discussed earlier, the FCC subsequently ruled the post-*Carterfone* protective device requirement violative of the Communications Act. Thus the challenged conduct was primarily the result of independent business judgment as to how to accommodate available technology with the need to protect the telephone lines and the right of customers to use them. *Cf. Cantor v. Detroit Edison Co.*, 428 U.S. 579, 593-94, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976); *Otter Tail Power Co. v. Federal Power Commission*, 410 U.S. 366, 374, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973). No policy decision by the FCC will be nullified by application of the antitrust laws to the conduct challenged here.[15] This is particularly true in light of

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[15] In *Essential Communication Systems, Inc. v. American Tel. & Tel. Co.*, 446 F.Supp. 1090 (D.N.J.1978), the district court examined the regulatory history of interconnection and concluded that the post-*Carterfone* tariffs were "sanctioned by the FCC as a means to serve its regulatory responsibilities and administrative needs." *Id.* at 1102. As a result, the court found application of the antitrust laws repugnant to the FCC's action. This Court must respectfully disagree. The FCC explicitly withheld even provisional approval of the tariffs. Also, the FCC would undoubtedly have learned at least as much from the experiences of a more liberal interconnection method adopted by the carriers. Finally, the absence of sufficient technical information concerning interconnection may justify the course taken by the defendants, but that is a question to be considered when examining the antitrust question on the merits under the "Rule of Reason." *See Jacobi v. Bache & Co.*, 520 F.2d 1231 (2d Cir. 1975), *cert. denied*, 423 U.S. 1087, 96 S.Ct. 784, 46 L.Ed.2d 642 (1976). It is not a reason to disclaim jurisdiction.

the relief requested. Injunctive relief, if granted, would restrict future FCC decision-making or subject defendants to conflicting standards. Northeastern, however, seeks only monetary damages arising from past, federally regulated activity. Thus, there is no potential for interference with agency decisionmaking.

[4] In sum, neither the regulatory framework of the Communications Act of 1934 nor the particular regulatory efforts by the FCC require an immunity for the challenged conduct; application of the antitrust laws will be neither disruptive nor unnecessary. Therefore, Northeastern may sue the defendants under the antitrust laws for damages resulting from conduct relating to the design of protective telephone interconnection equipment prior to the effective date of the FCC's registration program for interconnect equipment.[16]

II. THE STATE ACTION LIMITATION OF THE SHERMAN ACT.

STATE REGULATION

Although the FCC declared its "paramount jurisdiction" over the technical standards for interconnection equipment in 1974, and established a comprehensive registration program in 1975, only the states exercise authority over non-

[16]Northeastern also challenged a number of other actions by the defendants, including massive advertising intended to cast doubt upon the products and services of the defendants' interconnection competitors, an expensive research and development program, and the announcement of improvements in telephone equipment prior to the establishment of a tariff and before the equipment is in stock. The FCC's efforts to regulate these activities have been far less significant than its efforts in the area of interconnection design, and the statutory framework is no more suggestive of a congressional intent to immunize such conduct. Accordingly, these ancillary activities are not immune from the antitrust laws by virtue of federal regulation.

technical interconnection matters, including rates and charges for interconnection. Defendant SNET is a public utility regulated by the PUCA under the Connecticut Public Service Companies Act, which provides the PUCA with jurisdiction over "equipment ... used in the conduct of the business of the company." Conn.Gen.Stat. § 16-1 (1977). Under § 16-19(a), SNET must file all proposed rate amendments with the PUCA and the PUCA must hold a public hearing and conduct an investigation.

The criteria to be applied by the PUCA in judging a rate proposal include whether the rates are "unreasonably discriminatory or more or less than just, reasonable and adequate, or that the service furnished by the company is inadequate to or in excess of public necessity and convenience." *Id.* The regulated company has the burden of proving that the proposed rate is just and reasonable. Conn.Gen.Stat. § 16-22 (1977). In addition, when considering alterations in specific rates and services, as well as when examining "the expansion of plant and equipment..., operations and internal workings ... and the establishment of the level and structure of rates," the PUCA must find that there is a clear public need for the proposed service and that the company is competent to provide the service efficiently. The PUCA must also consider public safety, economic development, energy conservation and the natural environment. Finally, the PUCA must maintain a balance between the public interest and the company's financial soundness. *See id.;* Conn.Gen.Stat. § 16-19e(a)(1) - (4) (1977). If the proposal fails to meet these standards, the PUCA must "determine and prescribe, as appropriate, an adequate service to be furnished or just and reasonable maximum rates and charges." Conn.Gen.Stat. § 16-19(a) (1977). The PUCA is supposed to reach a final decision within 150 days from the proposed effective date, *Id.* How-

ever, if the Authority has not made a decision within the required period, the proposed amendment may become effective if the company provides the Authority with sufficient financial assurances that the revenues collected in excess of the rates eventually approved by the Commission will be repaid. Conn.Gen.Stat. § 16-19(b) (1977).

Operating expenses are subject to a PUCA audit every three years, although an audit need be conducted only every six years if the PUCA determines that a more frequent audit is unnecessary. If those conducting the audit conclude that "the operating procedures or any other internal workings of the affected public service company are inefficient, improvident, unreasonable, negligent or in abuse of discretion," the PUCA has the authority, subject to notice and a hearing, to order "new or altered practices and procedures . . . necessary to promote efficient and adequate service to meet the public convenience and necessity." Conn.Gen.Stat. § 16-8(b) (1977).

After deciding to meet the competitive challenge presented by Northeastern and others as the result of the *Carterfone* decision, SNET in 1976 filed tariffs with the PUCA dealing with the provision of private branch exchange ("PBX") service to its customers.[17] Because of the possible competitive impact of these tariffs, the PUCA delayed the effective date of the new rates and at its own initiative held three public hearings in September. Attorneys for both SNET and Northeastern participated, as did a representative of another competitor in the PBX market, and Connecticut's Consumer Counsel. SNET's competitors objected to one of the two alternative methods of payment — "the customized payment

[17]PBX equipment interconnects the various telephone stations on the customer's premises, and also links this internal system to the public telephone lines.

plan"—[18] in part because it allegedly established rates so low that cross-subsidization with revenues from other utility services was required, and because it discriminated against those not adopting the plan.

In its decision of January 17, 1977,[19] the PUCA found that the new services would contribute revenue to the company. In discussing Northeastern's claim that the customized payment plan was anti-competitive, the PUCA explained that "[i]t is difficult for this authority to visualize any rate structure or pricing level that would not be anticompetitive and at the same time not limit the availability of the product to the customer at a reasonable price." The PUCA then continued with a disclaimer: "It is not the function of this agency to protect competitors from the regulated utility but rather to assure that consumers are provided the best quality service at the lowest possible price." In order to fulfill this function, the Authority explained that it follows a policy of "maximizing contributions from vertical and competitive services thus minimizing the revenue requirements for basic exchange service." Because the proposed tariffs were found consistent with this policy, they received the ageny's approval.

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[18]This plan includes a two-tier payment schedule to allow the customer to pay monthly maintenance costs while meeting the capital costs through payments spread over a period of years. The use of this payment method by regulated telephone utilities is widespread. *Economic Implications and Interrelationships Arising from Policies and Practices Relating to Customer Interconnection*, 61 F.C.C.2d 766, 868 (1976). According to the plantiff's calculations, this two-tier plan is attractive only if capital payments are extended over at least seven years, during which period the customer will be inaccessible to competitors.

[19]*Tariff Filing of Southern New England Telephone Company to Provide Dimension 100 and 400 PBX Service*, No. 760719 (Conn.Pub.Util. Control Auth., Jan. 17, 1977), 17 P.U.R. 4th 191 (1977).

On March 11, 1977 SNET filed another tariff request, this time dealing with a different type of business terminal equipment-key telephone systems ("KTS").[20] Because of the competitive impact of these services on the key system market, the PUCA again at its own initiative suspended the proposed effective date of the tariffs and scheduled a public hearing for April 18, 1977. The proposed tariffs included a "customized payment plan" virtually identical to the PBX payment plan approved earlier. SNET's competitors objected to the payment plan proposed by the defendant because, in part, the plan discriminated against most rate payers by insulating customized plan subscribers from future rate increases. On September 30, 1977 the PUCA approved the tariffs in nearly all aspects,[21] finding a "definite market need" for the new KTS systems and predicting that the systems' new capabilities would "allow SNET the opportunity to better compete in the Key telephone market." The Authority also noted that the products would not require cross-subsidization from other service.

STATE ACTION

Northeastern challenges a variety of activities by SNET relating to the marketing of business terminal equipment as violative of the Sherman Act. The plaintiff sees the legally protected monopoly power of the utility as providing the defendants with the capacity to underprice the products of the plaintiff and others, while the defendants see these

[20]KTS equipment usually consists of a telephone with various buttons allowing the customer to connect to numerous public lines or other internal lines.

[21]*Application of the Southern New England Telephone Company for Approval of a Tariff to Provide Two New Service Offerings, Con Key 416 and Con Key 2152, and to Classify as Obsolete Con Key 1434 and Certain Con Key 718 Rates and Equipment, No.* 770321 (Conn. Pub.Util.Control Auth., Sept. 30, 1977).

activities as the embodiment of state telecommunications policy inconsistent with, and not subject to, federal antitrust doctrine. Primarily, Northeastern alleges that the defendants violated the Sherman Act in the pricing of terminal equipment, including both the amount and methods of payment. As a result of these activities, Northeastern argues, the defendants have been able to maintain over ninety-five percent of the business telephone terminal equipment market[22] since the *Carterfone* decision of the FCC.

In *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), the Supreme Court considered the applicability of the Sherman Act to conduct of a public utility pursuant to a tariff approved by the state regulatory body. A state-regulated electric company ran a light-bulb exchange program for its customers, much to the dismay of the plaintiff-retailer. The bulbs were distributed "free," and the costs were recouped through the rate structure. Because the program was included in the approved tariff, the utility was required to operate the program until a new tariff not including the program was approved. In holding that the Sherman Act applied, the Court focused upon two general issues: first, whether it would be unfair to impose two conflicting legal standards upon the defendant utility, and, second, whether application of federal antitrust principals to the defendant's state-regulated conduct would make the state regulatory program unworkable. *Id.* at 592, 96 S.Ct. 3110 (plurality opinion); *id.* at 603, 96 S.Ct. 3110 (Burger, C.J., concurring).

In discussing the fairness issue, the Supreme Court phrased the inquiry as whether "the private party exercised sufficient

[22]The market has been defined by the plaintiff to include only PBX and KTS telephone equipment.

freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision." *Id.* at 593, 96 S.Ct. at 3119. The respondent utility in *Cantor*, as just explained, operated the light bulb program with the approval of the state regulators, and could not abandon the program without such permission. The initiative to conduct the program, however, came from the utility. As a result, the Court saw "nothing unjust in the conclusion that the respondent's participation in the decision is sufficiently significant to require that its conduct implementing the decision, like comparable conduct by unregulated businesses, conform to applicable federal law." *Id.* at 594, 96 S.Ct. at 3119. *Cf. Otter Tail Power Co. v. United States*, *supra* 410 U.S. at 374, 93 S.Ct. 1022. The same conclusion should be reached in the present case. The defendant SNET has initiated the equipment marketing program not at the command of the state, but after exercising its own business judgment regarding the potential profits to be derived from entering the PBX and KTS markets. Therefore, there is no unfairness in subjecting the regulated defendant SNET to the competitive strictures of the antitrust laws.

The more difficult question is whether requiring the defendants to conform to federal antitrust law will significantly hamper the state's ability to pursue its legitimate regulatory goals. The defendants' argument here is the same as that raised by the *amici curiae* in *Cantor*: that Congress did not intend to apply the antitrust laws to activities regulated by state agencies under a "public interest" standard that is "fundamentally inconsistent" with the antitrust law. 428 U.S. at 595, 96 S.Ct. 3110. The Supreme Court found

this argument "unacceptable" as a general matter,[23] and as applied to the facts of that case. The argument must fail in this case as well.

To succeed the defendants must show "that the state has an independent regulatory interest in the subject matter of the antitrust controversy; that there exists a clear and affirmative articulation of the state's policy with regard to that interest; and that the state supervision is active." *Mobilfone of Northeastern Pennsylvania, Inc. v. Commonwealth Telephone Co.*, 571 F.2d 141, 144 (3d Cir. 1978). *See Bates v. State Bar of Arizona*, 433 U.S. 350, 361, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977).

It should first be noted that, unlike the light-bulb exchange program in *Cantor*, the activity challenged in this case, and plaintiff's criticisms of that activity, were the subjects of agency scrutiny. Thus the regulation was "active," and upon approval the PUCA's role was no longer "neutral," a term used by the *Cantor* majority to describe the Michigan Public Service Commission's position on the bulb program. *See Cantor v. Detroit Edison Co.*, 428 U.S. at 585, 96 S.Ct. 3110 (plurality opinion); *id.* at 604-605, 96 S.Ct. 3110 (Burger, C.J., concurring). *See City of Lafayette v. Louisiana Power*

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[23]The Supreme Court plurality wrote as follows:

There are at least three reasons why this argument is unacceptable. First, merely because certain conduct may be subject both to state regulation and to the federal antitrust laws does not necessarily mean that it must satisfy inconsistent standards; second, even assuming inconsistency, we could not accept the view that the federal interest must inevitably be subordinated to the state's; and finally, even if we were to assume that Congress did not intend the antitrust laws to apply to areas of the economy primarily regulated by a State, that assumption would not foreclose the enforcement of the antitrust laws in an essentially unregulated area such as the market for electric light bulbs. 428 U.S. at 595, 96 S.Ct. at 3120.

& Light Co., 435 U.S. 389, 413, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978) (plurality opinion). However, the other two prerequisites to a finding of state action—a "clear and affirmative articulation of the state's policy" and an "independent regulatory interest"—are lacking.

There is no regulatory statute specifically referring to the type of activity challenged, and the statutory framework does not authorize regulation of the terminal equipment market. Indeed, in approving the customized payment plan for KTS systems, the PUCA found that the plan would allow SNET to "better compete in the Key telephone market." *Com Key Decision, supra* note 21, at 10. *Contrast Cantor v. Detroit Edison Co., supra* 428 U.S. at 584, 96 S.Ct. 3110, with *Bates v. State Bar of Arizona, supra* 433 U.S. at 362, 97 S.Ct. 2691; and *Mobilfone of Northeastern Pennsylvania, Inc. v. Commonwealth Telephone Co., supra* at 145. The PUCA merely found that the customized payment plan did not violate the Connecticut Public Service Companies Act. There is no indication that an abandonment of the plan would meet with Commission resistance. Thus, it cannot be said that SNET's payment plan was proposed and approved " 'pursuant to state policy to displace competition with regulation or monopoly public service' " in the business telephone equipment market. *City of Lafayette v. Louisiana Power & Light Co., supra*, 435 U.S. at 406, 98 S.Ct. at 1133 (plurality opinion); *id.* at 421-428, 98 S.Ct. at 1141-1144 (Burger, C. J., concurring). *See id.* at 428, 98 S.Ct. 1144 (Marshall, J., concurring).

Finally, the PUCA has no other "independent regulatory interest" that might be frustrated by application of the antitrust laws to the customized payment plan. The Connecticut regulatory scheme, similar to the Michigan scheme in *Cantor*, is not seriously affected by application of the anti-

trust laws to SNET's challenged practices. According to the PUCA decision approving the customized payment plan for PBX equipment, the policy of the PUCA was to maximize "revenue contributions from ... competitive services thus minimizing revenue requirements for basic exchange service." *PBX Filing, supra* note 19, 17 P.U.R. 4th at 195. The PUCA concluded that the rates were high enough to make cross-subsidization unnecessary, thus the payment plans were found consistent with the Authority's revenue policy. At first glance, application of the Sherman Act would seem to conflict with the PUCA's revenue goals in that competition in the business terminal equipment market will tend to keep prices low, and thus minimize the profits available to support basic exchange service for residential customers. If subsidization of basic exchange service is the regulatory goal, however, the PUCA need merely restructure the rates for service, increasing the costs to businesses that use PBX equipment (no matter who supplies it) and whose demand for basic service is inelastic *See North Carolina Util. Comm'n v. FCC, supra*, 537 F.2d at 1048. Given the availability of this and other regulatory strategies to redistribute the costs of telephone service, this Court does not consider significant the potential loss of terminal equipment as a source of revenue.

[5] Thus, it appears that an immunity from the Sherman Act is not "imperative to the continued effective functioning" of the PUCA as envisioned by the Connecticut legislature. *Cantor v. Detroit Edison Co., supra* 428 U.S. at 597 n. 36, 96 S.Ct. at 3121. Accordingly, SNET's use of the customized payment plan is susceptible to federal antitrust scrutiny.[24]

[24]The customized payment plan having been found not to be exempt from the Sherman Act, the ancillary activities challenged by Northeastern, *see* note 16 *supra*, are virtually a *fortiori* non-exempt as well. The PUCA's authority is broad, but vague and

(Continued on next page)

To hold otherwise would result in a needless sacrifice of national economic policy. As the *Cantor* court noted, "[t]here is no logical inconsistency between requiring such a firm to meet regulatory criteria insofar as it is exercising its natural monopoly powers and also to comply with antitrust standards to the extent that it engages in business activity in competitive areas of the economy." *Id.* at 596, 96 S.Ct. at 3120.

III.

[6] Northeastern complains that defendants have "carried on public relations campaigns for a moratorium on interconnect competition." It is unclear exactly what the plaintiff means, and the defendants have interpreted this portion of the complaint as attacking the defendants' lobbying efforts for the Consumer Communications Reform Act (S. 530, 95th Cong., 1st Sess.; H.R. 8, 95th Cong., 1st Sess.) which would reestablish the primacy of state regulation over telephone equipment. If the plaintiff's claim is concerned solely with these political efforts, the First Amendment requires dismissal. *See Eastern Railroad Presidents Conference v. Noerr Freight, Inc.*, 365 U.S. 127, 31 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct.

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unexercised. Section 16-6b of the Connecticut Public Service Companies Act empowers the PUCA to adopt regulations dealing with "rates and charges, services, accounting practices, safety and the conduct of operations generally . . . ." The PUCA has not enacted regulations dealing with most of the criticized practices. Although in 1975 the state legislature provided the PUCA with the explicit authority to regulate advertising, Conn.Gen.Stat. § 19d(c), the authority has not yet promulgated regulations. Also, although the PUCA has examined SNET's advertising expenditures, the examination was not conducted with an eye toward the anti-competitive impact of such expenditures. *See Application of Southern New England Tel. Co. to Increase It's Rates and Charges for Telephone Service Affecting All Subscribers*, Docket No. 11671 (June 12, 1975).

1585, 14 L.Ed.2d 626 (1965); *cf. California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-511, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). However, the plaintiff has no duty to specify in the complaint the exact conduct supporting his claims. It is possible that the plaintiff has other activities in mind as well. As a result, dismissal of that portion of the complaint addressed to the defendants' efforts to establish a moratorium on interconnect competition would be premature. *See Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

IV.

[7] Defendants argue that the Connecticut Antitrust Act, Conn.Gen.Stat. § 35-24 *et seq.* (1977), is not applicable to the challenged conduct of the defendants. They assert that state law is preempted, at least in the area of federal regulation, by the pervasive regulation of the FCC. Having already concluded that FCC regulation is not so pervasive as to require an immunity from the Sherman Act, this Court considers the preemption argument based upon federal regulation to have lost its force. Defendants also argue that under Connecticut law the state antitrust act does not apply, a position necessarily rooted in the Connecticut Supreme Court decision of *Mazzola v. Southern New England Telephone Co.*, 169 Conn. 344, 363 A.2d 170 (1975).

The Connecticut Public Service Companies Act does not expressly empower the PUCA to exempt activities from the state antitrust laws. In *Mazzola*, the state supreme court held that the Connecticut Public Service Companies Act did not impliedly confer upon the Public Utilities Commission (the predecessor to the PUCA) the authority to exempt from the state antitrust laws conduct by SNET included in

an effective tariff. The court's decision was based on the exemption clause of the state antitrust law, which excluded from the act's sweep activity "*specifically* directed or required by a *statute* of the state, or of the United States." Conn.Gen. Stat. § 35-31(b) (emphasis added). This exemption, according to the *Mazzola* court, erected a more stringent standard than the compulsion test of *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975). *Mazzola, supra* 169 Conn. at 366, 363 A.2d 170.

Defendants attempt to distinguish *Mazzola* on the basis of subsequent amendments to the Public Service Companies Act. A number of factors seen as significant by the *Mazzola* court were indeed altered by these amendments. In particular, a regulated utility must now hold a public hearing on any amendment to rates and investigate the amendment to determine whether it conforms to the regulatory criteria. However, other factors thought important by the Connecticut court remain. The PUCA has no explicit statutory obligation to consider the possibility anticompetitive effects of a proposed tariff. *See Mazzola supra*, at 368-69, 363 A.2d 170. Rather, the PUCA must focus on efficiency, public safety, the promotion of economic development, conservation of energy, and "prudent management" of the natural environment. Conn.Gen.Stat. § 16-19e. The PUCA must also consider whether the proposed rate amendments are unreasonably discriminatory, unjust, or inadequate to or in excess of the public convenience and necessity. Conn.GenStat. § 16-19. Furthermore, the Connecticut Supreme Court in *Mazzola* made clear that the focus was on the statutory structure, and not on whether the PUCA had actually contemplated the challenged activity when approving the tariff. *Mazzola, supra* at 366, 363 A.2d 170. Finally, as noted above, the Connecticut Supreme Court interpreted the statutory exemp-

tion provision as narrower than the *Parker v. Brown* doctrine. And this Court has just interpreted that doctrine, as further articulated in later Supreme Court cases, not to require an antitrust immunity based upon PUCA regulation.

[8] Nevertheless, the *Mazzola* decision is clearly subject to varying interpretations in light of subsequent amendments to the Public Service Companies Act, and the recent Supreme Court decisions may well have shaped the state action doctrine in a manner not anticipated by the Connecticut legislature or by the *Mazzola* court. In addition to the difficulty of the question, the immunity issue raised under state law is deeply embedded in Connecticut's developing regulatory structure. The recently amended Connecticut Public Service Companies Act and the state's new antitrust law have not been interpreted together. Thus a decision by this Court would be merely a "forecast rather than a determination." *Railroad Commission v. Pullman Co.*, 312 U.S. 496, 499, 61 S.Ct. 643, 85 L.Ed. 971 (1941). As the Second Circuit Court of Appeals explained in *Naylor v. Case &McGrath, Inc.*, 585 F.2d 557, at 565 (2d Cir. 1978).

> [a]bstention in favor of state court adjudication is sound judicial administration where, as here, it can increase the assurance that all those affected by the statute in question, including the parties to this action, will be given the benefit of an authoritative and uniform rule of law applied alike to all businesses and grievants.

Abstention from the difficult immunity question in this case will permit the "even development of State Law." *Id.* at 565. Accordingly, the claims under the Connecticut Antitrust Act must be dismissed without prejudice to a subsequent filing in the state courts.

The defendants' motions to dismiss are hereby granted as to the state antitrust claim, and denied in all other aspects.

B-1

NORTHEASTERN TELEPHONE COMPANY

Plaintiff,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.,

Defendants.

Civ. A. No. B-75-319.

United States District Court,

D. Connecticut

July 30, 1980.

Supplier of certain types of telephone terminal equipment brought action against parts of integrated telecommunications common carrier enterprise alleging violations of antitrust laws in connection with regulated telephone utility in business terminal equipment market. The District Court, Eginton, J., held that: (1) defendants were not immune from antitrust laws for any of conduct for which they were found liable in private treble damage action under either federally regulated conduct or state action doctrine; (2) evidence supported jury's findings that defendant had monopolized the relevant market, that it had intended to monopolize the relevant market, that all three defendants had engaged in a conspiracy to monopolize the relevant market, that all three defendants had engaged in a conspiracy to restrain trade, and that plaintiff suffered injury in its business and that the injury flowed directly from defendants' anticompetitive and predatory conduct; and (3) evidence supported award of damages and attorneys' fees.

Order entered.

1. Monopolies — 12(16)

Despite extensive investigation of the interconnect question by the Federal Communications Commission, Commis-

sion's regulation of interconnect area fell far short of being pervasive and such regulation could not support a finding of implied immunity for anticompetitive conduct engaged in by parts of integrated telecommunication common carrier enterprise, which enterprise owned, operated, and managed nationwide telecommunications network and which was found liable in private treble damage action concerning application of antitrust clause to regulated telephone utility in business terminal equipment market. Clayton Act, § 4, 15 U.S.C.A. § 15.

2. Monopolies — 12(1)

In determining whether anticompetitive conduct engaged in by private parties enjoys immunity from federal antitrust law under state action doctrine, inquiries are whether under state law defendants are compelled to engage in anticompetitive conduct, whether such conduct is pursuant to a clearly articulated and affirmatively expressed goal to displace unfettered business freedom, and whether anticompetitive or predatory conduct is necessary to effectuate state policy.

3. Monopolies — 12(16)

Although the Connecticut Department of Public Utility Control had actively exercised its regulatory authority over pricing practices of part of integrated telecommunications common carrier enterprise through, among other things, specific approval of much of conduct that jury found to be anticompetitive in private treble damage action which concerned application of antitrust laws to regulated telephone utility in business terminal equipment market, where defendant had initiated and engaged in conduct at its own instance, there was no state action immunity for pricing

practices engaged in by defendant nor for any other areas of anticompetitive conduct which were regulated if at all, to a much lesser degree. Clayton Act, § 4, 15 U.S.C.A. § 15.

4. Monopolies — 12(1.3)

Monopolization requires proof of possession of monopoly power in relevant market and deliberate and unlawful acquisition or maintenance of that power.

5. Monopolies — 17(1.8)

Court would decline to adopt marginal or incremental cost standard for determining whether defendants charged with violation of antitrust laws had engaged in predatory pricing and instead, defendants' pricing conduct would be viewed against a pricing floor of fully distributed costs.

6. Monopolies — 28(7.4)

In absence of direct evidence demonstrating pricing below fully distributed cost, jury may nevertheless find that pricing is predatory and in violation of antitrust laws.

7. Conspiracy — 19

Because a conspiracy is rarely susceptible of direct proof, a party may properly rely upon circumstantial evidence from which a conspiracy violation may be inferred.

8. Monopolies — 28(1.6)

A showing of injury to business is a prerequisite of standing to sue for an antitrust violation.

9. Monopolies — 28(7.5, 7.6)

In action brought by supplier of certain types of telephone terminal equipment alleging violation of antitrust laws by

parts of integrated telecommunication common carrier enterprise, evidence was sufficient to support jury's findings that defendant had monopolized relevant market, that it had intended to monopolize relevant market, that all three defendants had engaged in a conspiracy to monopolize the relevant market, that all three defendants had engaged in a conspiracy to restrain trade, that plaintiff's supplier was injured in its business and that the injury flowed directly from defendants' anticompetitive and predatory conduct in violation of the Clayton Act. Clayton Act, § 4, 15 U.S.C.A. § 15.

10. Monopolies — 28(9)

Although damages in private treble damage action brought under Clayton Act may be ascertained from jury's just and reasonable inference from proof of wrongful act, its tendency to injure plaintiff's business, and evidence of decline in profits, there must nevertheless be a reasonable foundation from which a jury can calculate the amount of damages. Clayton Act, § 4, 15 U.S.C.A. § 15.

11. Monopolies — 28(7.2)

General rule in antitrust case is that plaintiff must prove amount of damages flowing from separate area of anticompetitive conduct.

12. Monopolies — 28(9)

In action by supplier of certain types of telephone terminal equipment against parts of integrated telecommunication common carrier enterprise alleging various violations of antitrust law in private treble damage action which concerned application of antitrust laws to regulated telephone utility in business terminal equipment market, supplier's failure

to put forth evidence with respect to each anticompetitive or predatory act did not deprive jury of rational basis on which to render its damage awards. Clayton Act, § 4, 15 U.S.C.A. § 15.

13. Monopolies — 28(7.2)

Antitrust plaintiffs are not required to carry a heavy burden with respect to a showing of the amount of damages; however, there must be a reasonable foundation from which a jury can calculate such an amount. Clayton Act, §4, 15 U.S.C.A. § 15.

14. Monopolies— 28(9)

Antitrust plaintiff may recover both for past lost profits and for decrease in going concern value. Clayton Act, § 4, 15 U.S.C.A. § 15.

15. Monopolies — 28(7.6)

In action brought by supplier of certain types of telephone terminal equipment against parts of integrated telecommunications common carrier enterprise alleging violations of antitrust laws in connection with regulated telephone utility in business terminal equipment market, evidence supported finding of jury as to damages. Clayton Act, § 4, 15 U.S.C.A. § 15.

16. Monopolies — 12(16)

A specific course of conduct approved by a regulatory body, as being conduct in the "public interest," does not necessarily fall outside proscription of antitrust laws. Clayton Act, § 4, 15 U.S.C.A. § 15.

17. Federal Civil Procedure — 2092

In action wherein supplier of certain types of telephone terminal equipment claimed violations of federal antitrust laws by parts of integrated telecommunications common carrier enterprise, exclusion of potential jurors who owned stock of defendant corporations was proper as was exclusion of persons from panel who demonstrated that a six to eight-week trial would work an undue hardship or extreme inconvenience on themselves or their employer. 28 U.S.C.A. § 1861.

18. Monopolies — 28(9)

Procedure to be followed on considering a request for attorneys' fees in private antitrust action is lodestar approach whereby court first computes lodestar by multiplying the attorneys' hours by reasonable hourly rates and secondly, where plaintiff's counsel is paid on a contingent fee basis, court may adjust lodestar to account for risk and quality factors. Clayton Act, § 4, 15 U.S.C.A. § 15.

19. Monopolies — 28(9)

Since lodestar represents a reasonable hourly rate for a reasonable number of hours, an award of the lodestar figure alone fulfills the Clayton Act's provision for "a reasonable attorney's fee." Clayton Act, § 4, 15 U.S.C.A. § 15.

20. Monopolies — 28(9)

In determining attorney's fees under Clayton Act, with respect to risk factor to be considered when plaintiff's counsel is paid on contingent fee basis, factors which court may consider to determine whether an increase in lodestar is warranted are plaintiff's burden, risks assumed by plaintiff's

counsel, and delay in receiving payment. Clayton Act, § 4, 15 U.S.C.A. § 15.

21. Monopolies — 28(9)

In action brought by supplier of certain types of telephone terminal equipment against parts of integrated telecommunications common carrier enterprise charging violations of antitrust laws in connection with regulated telephone utility and business terminal equipment market, plaintiff's counsel would be awarded attorneys' fees with an adjustment of 50% in the lodestar. Clayton Act, § 4, 15 U.S.C.A. § 15.

J. Daniel Sagarin, Schless & Sagarin, Bridgeport, Conn., Philip E. McCleery, pro hac vice, J. Robert Sheehy, pro hac vice, Sheehy, Lovelace & Mayfield, Waco, Tex., for plaintiff.

Marshall Collins, Asst. Atty. Gen., Hartford, Conn., for amicus curiae.

John M. Goodman, Leonard Joseph, J. Paul McGrath, Dewey, Ballantine, Bushby, Palmer & Wood, New York City, Lewis H. Ulman and Peter J. Tyrrell, William J. O'Keefe, Anne U. MacClintock, Southern New England Telephone Co., New Haven, Conn., William R. Moller, Moller & Horton, Hartford, Conn., Burton K. Katkin, New York City, for defendants.

EGINTON, District Judge.

RULING ON POST-TRIAL MOTIONS

This case presents a number of important issues concerning the application of the antitrust laws to a regulated telephone utility in the business terminal equipment market.

These issues arise in the context of a private treble damage action brought pursuant to section 4 of the Clayton Act, 15 U.S.C. § 15, and tried to a jury.

FACTUAL BACKGROUND

Plaintiff, Northeastern Telephone Company ("Northeastern"), is a supplier of certain types of telephone terminal equipment and has been engaged in the sale, installation, and servicing of such equipment in the State of Connecticut since 1972. Northeastern is not licensed to provide, and does not provide, telephone service, but instead sells terminal equipment directly to users who obtain services from telecommunication common carriers. When Northeastern entered the terminal equipment business, it did so with a small amount of capital and over the past eight years has managed to achieve an impressive record of growth. The company started with only its two founders doing primarily maintenance work on telephone systems sold and installed by International Telephone & Telegraph; it now has over fifty employees. Initially, Northeastern operated out of part of a building that was formerly a church; since then, it has expanded at the rate of approximately one new office every year and now has permanent facilities in Stamford, Hartford, New London, Danbury, and Waterbury, in addition to new headquarters in Milford. Northeastern's revenues its first year were approximately $70,000; in its seventh year, it posted sales of over $3,000,000.

Defendants American Telephone & Telegraph ("AT&T"), Southern New England Telephone Company ("SNET"), and Western Electric Company ("Western Electric"), are parts of an integrated telecommunication common carrier enterprise known as the Bell System, which enterprise, in cooperation with some 1600 independent telephone com-

panies, owns, operates, and manages the nationwide telecommunications network. As a part of its telecommunications services, the Bell System provides terminal equipment to its customers under tariff's that have been filed with appropriate regulatory agencies. AT&T is the parent company of the Bell System and has an interest in twenty-three operating telephone companies, which provide most of the local telephone service in the country. AT&T's Long Lines Department, in cooperation with these companies and with the non-Bell System telephone companies, coordinates and supervises the long distance telephone service in this country. AT&T has entered into License Contracts with each of the Bell System operating companies, under which AT&T's general departments provide those operating companies with a vast array of services.

SNET, one of the two Bell System operating companies in which AT&T owns only a minority interest, is specially chartered by the Connecticut General Assembly to provide telephone service in virtually all of Connecticut. It provides basic residential and business service, intercity toll service, and a variety of other business, public, and residential services, including provision of terminal equipment. SNET, unlike many of its competitors, does not sell terminal equipment as such. Rather, it provides its customers with terminal equipment through a variety of different lease-type arrangements.

Almost all of Western Electric's business involves the manufacture and supply of telephone equipment for Bell System companies. The operating companies, like SNET, are not required, however, to acquire such equipment from Western Electric, and are free to acquire such equipment from other manufacturers. During most of the period in

question in this suit, SNET purchased much of its private branch exchange equipment from Nippon Electric Company (a Japanese company which also supplied Northeastern), while it bought its key telephone system equipment from Western.

This suit was instituted on October 22, 1975. The amended complaint, filed two weeks after the commencement of trial, alleged that defendants monopolized, attempted and conspired to monopolize, and restrained trade in the business terminal equipment market in the State of Connecticut in violation of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 & 2. The request for relief included treble damages, attorney fees, and costs as provided for under section 4 of the Clayton Act, 15 U.S.C. § 15. A preliminary injunction was sought and subsequently abandoned in reliance on an agreement among the parties to proceed promptly to trial. Northeastern no longer asserts any claims for equitable relief.

This action involves two general types of telephone terminal equipment: private branch exchanges and key telephone systems. A private branch exchange ("PBX") consists of equipment connected to the telephone network located on a customer's premises which can switch calls from one telephone to another, a switchboard to control that operation, and the associated telephone sets and wiring. A key telephone system ("KTS") consists of a group of ordinary telephones, usually used in offices, which provide the user with a number of buttons or keys which permit access to a multiplicity of communications lines for incoming or outgoing calls from a single telephone station.

Until 1969, federal and state tariff's generally required that equipment connected to the telephone network be

supplied and maintained by an operating telephone company (one of the 23 affiliated with the Bell System or one of the more than 1600 independent operating companies). In *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420, *reconsideration denied*, 14 F.C.C.-2d 571 (1968), the Federal Communications Commission ("FCC") embarked upon a major reform of the telephone interconnection. In that decision, the FCC ruled that defendants' tariffs prohibiting interconnection were unreasonable and unlawful under The Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* The Bell System responded to *Carterfone* by filing revised tariffs which, *inter alia*, permitted the direct electrical interconnection of customer-provided equipment through a protective connecting arrangement ("PCA") provided, installed, and maintained by the telephone companies at the customer's expense.

Trial began on October 10, 1979. By agreement of counsel, the trial was bifurcated; liability was tried first, damages were then determined in a separate trial before the same jury. The parties stipulated that the relevant product and geographic market was the market for business terminal equipment, namely, PBXs and KTSs provided to business customers, in those areas in the State of Connecticut in which SNET provided local exchange service. The liability portion of the trial, including summations and the Court's charge, lasted twenty-one days.

In order to facilitate orderly decision-making and to ensure particularized appellate review, the Court submitted to the jury fourteen interrogatories on the liability issues. After one and one-half days of deliberations, the jury returned a liability verdict for Northeastern on all counts, finding that: (1) SNET had monopolized the relevant

market; (2) SNET had attempted to monopolize the relevant market; (3) all three defendants had engaged in a conspiracy to monopolize the relevant market; and (4) all three defendants had engaged in a conspiracy to restrain trade. The damages portion of the trial lasted five days, and after two and one-half days of deliberations, the jury returned a verdict in favor of Northeastern in the amount of $5,515,692. $3,368,906 of this amount was for lost profits; $2,146,786 was for damage to going concern value. Pursuant to section 4 of the Clayton Act, the Court ordered that the amount be trebled and that judgment enter in the amount of $16,547,076.

Pursuant to Fed.R.Civ.P. 50(b) and 59, defendants have moved for judgment notwithstanding the verdict, or in the alternative, for a new trial.[1] The motion is based on four grounds: (1) that the conduct that the jury found to be anticompetitive or predatory is within the exclusive jurisdiction of regulatory agencies and is immune from the antitrust laws; (2) that the evidence is legally insufficient to support the jury's verdict; (3) that Northeastern's proof of damages was defective; and (4) that there were errors in the selection of the jury and the charge to the jury. Also before the Court is Northeastern's application for an award of attorneys' fees.

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[1]At the end of Northeastern's case, both on liability and damages, defendants moved for a directed verdict. Defendants renewed their motion at the close of all evidence at both trials. These motions were denied by the Court and all issues were permitted to go to the jury. Though expressing doubt about the strength of some of Northeastern's claims, the Court recognized that it is normally "in the best interests of efficient judicial administration for the trial judge to refrain from considering a motion for a directed verdict in favor of deciding a motion for judgment n.o.v." *Mattivi v. South African Marine Corp.*, 618 F.2d 163, 166 n.2 (2d Cir. 1980).

I

IMPLIED ANTITRUST IMMUNITY

Defendants' initial contention in their motion for judgment n.o.v. is that the conduct for which they have been found liable falls within the exclusive jurisdiction of regulatory agencies and is immune from the antitrust laws because of pervasive regulation under a public interest standard. This same argument was made by defendants in their pretrial motion to dismiss and was extensively briefed and argued by the parties at that time. Judge T. F. Gilroy Daly,[2] in denying the motion to dismiss,[3] found that defendants had not made the requisite showing to support an implied immunity from the antitrust laws. *Northeastern Telephone Co. v. American Telephone & Telegraph Co.*, 477 F.Supp. 251 (D.Conn.1978) [hereinafter "*Northeastern*"]. This Court is in full accord with Judge Daly's ruling on the immunity issue and therefore will not undertake a complete review of the legal issues.[4] Rather, the Court will address the immunity arguments solely in the context of the evidence adduced at trial.

At the outset, it is important to distinguish between that conduct which is subject to federal regulation and that conduct involved in this case which is regulated by a state

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[2]This case was transferred to the undersigned on August 1, 1979 solely for the purpose of pretrial and trial. Prior to that date, the case was assigned to the Hon. T. F. Gilroy Daly.

[3]The motion was granted with respect to Count Six of the Complaint which asserted a claim under the Connecticut Antitrust Act, Conn.Gen.Stat. §§ 35-24 *et seq.*

[4]The Court's decision to adhere to Judge Daly's ruling is based upon its own independent assessment of the various legal issues and not on a rote application of *res judicata* or the law of the case doctrine.

agency. The only area of conduct raised in this action which is directly regulated by the FCC is that of interconnection policy and the PCAs. The remaining areas of conduct-pricing, advertising, marketing, new products, and use of the utility functions — are all areas of conduct regulated, if at all, by the Department of Public Utility Control ("DPUC").[5] Because of the differing legal standards applicable to conduct regulated at the federal level and conduct regulated at the state level, each of these areas is discussed separately.

A. *Federally Regulated Conduct*

A brief review of the controlling legal principles is appropriate. The Communications Act of 1934 does not include an explicit, general exemption of FCC regulated activities from the antitrust laws. The issue, therefore, becomes one of implied immunity. The Supreme Court has held that there are only two restricted instances where an implied immunity may be found for business conduct subject to regulation under a federal regulatory scheme. First, immunity will be implied where the regulatory scheme established by Congress is so pervasive as to impliedly repeal the antitrust laws. *United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694, 730-35, 95 S.Ct. 2427, 2448-2450, 45 L.Ed.2d 486 (1975); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372-75, 93 S.Ct. 1022, 1027-1028, 35 L.Ed.2d 359 (1973). Second, immunity will be implied where application of the antitrust laws to the particular conduct challenged — in this case, the design of the PCA — would conflict with the requirements of the regulatory scheme in such a way that the scheme would be rendered unworkable.

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[5]Formerly the Public Utilities Control Authority.

Gordon v. New York Stock Exchange, Inc., 422 U.S. 659, 685-86, 691, 95 S.Ct. 2598, 2612-2613, 2615, 45 L.Ed.2d 463 (1975).

In either case, "[r]epeal of the antitrust laws by implication is not favored and not casually to be allowed. Only where there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied." *Gordon v. New York Stock Exchange, Inc., supra*, at 682, 95 S.Ct. at 2611, *citing United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51, 83 S.Ct. 1715, 1734, 10 L.Ed.2d 915 (1963). Additionally, "[r]epeal is to be regarded as implied only if necessary to make the [regulatory scheme] work, and even then only to the minimum extent necessary." *Silver v. New York Stock Exchange*, 373 U.S. 341, 357, 83 S.Ct. 1246, 1257, 10 L.Ed.2d 389 (1963).

Against this backdrop of legal principles, Judge Daly, after a thorough discussion of the FCC regulatory scheme and the FCC proceedings concerning the interconnect issue, and a detailed analysis of Supreme Court decisions which have considered implied antitrust immunity in other regulated industries, held that "neither the regulatory framework of the Communications Act of 1934 nor the particular regulatory efforts by the FCC require[d] an immunity for the challenged conduct" and that "application of the antitrust laws [would] be neither disruptive nor unnecessary." *Northeastern* at 260.[6]

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[6]One aspect not considered by Judge Daly at any length was the legislative and administrative history of the Communications Act. To the extent that it bears on the instant analysis, it plainly reinforces the decision reached by Judge Daly. *See, e. g., Essential Communications Sys., Inc. v. American Tel. & Tel. Co.*, 610 F.2d 1114, 1117-21 (3d Cir. 1979); *Litton Sys., Inc. v. American Tel. & Tel. Co.*, 487 F.Supp. 942, 947-50 (S.D.N.Y.1980).

Defendants now argue that the evidence adduced at trial compels a contrary result. In support of their claim, defendants point to a National Academy of Sciences ("NAS") study, "A Technical Analysis of the Common Carrier/User Interconnections Area," and the testimony of Lawrence Hohmann, Director of Facilities Engineering for AT&T. Defendants apparently contend that this evidence demonstrates the pervasive regulation exercised by the FCC over interconnect matters.

As noted previously, AT&T, in response to the *Carterfone* decision, filed tariff revisions permitting direct electrical connection of terminal equipment through a PCA provided, installed, and maintained by Bell System companies at the customer's expense. The FCC permitted the tariff revisions to go into effect but explicitly reserved decision on their lawfulness. *American Telephone & Telegraph Co. (AT&T) "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 610 (1968), *reconsideration denied*, 18 F.C.C.2d 871, 874 (1969).[7]

Shortly after the filing of these tariff revisions, the FCC undertook an investigation of the interconnect question, commissioning a study by the NAS. The NAS panel which was given responsibility for the study was comprised of persons from government, industry, and academia. The panel's primary function was "to make an assessment of the

[7]The basis for defendants' oft-repeated assertion that the FCC "approved" the tariff revision is difficult to discern. The FCC in its *Foreign Attachment* ruling plainly stated that "we will permit the tariff revisions to become effective as scheduled with the understanding that in doing so we are not giving any specific approval to the revised tariffs." 15 F.C.C.2d at 610. In denying reconsideration of the ruling, the FCC further stated that "[p]aragraph 27 of our decision is clear in its statement that 'our action is not to be construed as approval thereof and these tariffs are subject to such further action as the Commission may wish to take with respect thereto.' " 18 F.C.C.2d at 874.

technical factors affecting the common carrier/user interconnection area of public communications."

The panel studied the interconnect issue for over a year and presented its report to the FCC on June 10, 1970. The report concluded that "uncontrolled interconnection to the common carrier network . . . would be harmful." The report went on to identify specifically the kinds of harm that might result from such interconnection. The primary harms included hazardous voltages, line imbalance, excessive signal levels, and improper network signalling. The panel found that the requirement of a protective connecting arrangement provided by the carrier to insulate the network from customer-provided equipment was one reasonable method of preventing these harms. As yet another possibility, the panel suggested the institution of an ongoing program of standardization and properly enforced certification of equipment, installation, and maintenance. The panel did not undertake to determine which of these alternatives was preferable, stating that such a decision was beyond the purview of its study.

In addition to the NAS study, defendants also offered the Hohmann testimony mentioned above. Hohmann was personally involved with the work of the NAS panel. He served primarily as the AT&T contact to the NAS panel and was responsible for the submission of reports and other documents by AT&T to the panel. Hohmann's testimony concerned the general background of the FCC's interest in interconnection, AT&T's position and response, and the highlights of the principal findings of the NAS study.

[1] Defendants submit that this testimony, taken in conjunction with the NAS study itself, compels a finding of

pervasive regulation, and thus, implied immunity. This Court disagrees. First, the NAS study was explicitly considered by Judge Daly in his ruling on the motion to dismiss. *Northeastern* at 254. Second, the NAS study and the testimony of Hohmann are relevant, if at all, solely to the question of the reasonableness of the tariff revisions permitting interconnection and to the reasonableness of the PCA design; evidence more properly directed to the liability question than to the immunity issue. This evidence does not compel a finding of plain repugnancy between the FCC's authority to permit filed tariffs to become effective simply by their filing and this Court's authority to provide a remedy to competitors who are injured by anticompetitive conduct engaged in pursuant to those tariffs. Despite the FCC's "extensive" investigation of the interconnect question, the FCC's regulation of the interconnect area falls far short of being pervasive, and such regulation cannot support a finding of implied immunity for the anticompetitive conduct engaged in by the defendants.[9]

B. *State Action*

Most of the conduct found by the jury to be anticompetitive or predatory is conduct regulated by the Connecticut DPUC. Defendants forcefully contend that they are immune from liability with respect to this conduct under the "state action" doctrine enunciated in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). Again, a brief review of the controlling principles is necessary.

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[9]This result finds strong support in a series of recent decisions. *See, e. g., Essential Communications Sys., Inc. v. American Tel. & Tel. Co., supra; Litton Sys., Inc. v. American Tel. & Tel. Co., supra; Sound, Inc. v. American Tel. & Tel. Co.*, 1979-2 Trade Cas. 62,978 (D.Iowa 1979); *Jarvis, Inc. v. American Tel. & Tel. Co.*, 481 F.Supp. 120 (D.D.C.1978).

[2] In determining whether anticompetitive conduct engaged in by *private* parties, such as defendants, enjoys immunity under the state action doctrine, there are three principal inquiries: first, whether under state law defendants are compelled to engage in the anticompetitive conduct; second, whether such conduct is pursuant to a "clearly articulated and affirmatively expressed goal" to "displace unfettered business freedom"; and third, whether the anticompetitive or predatory conduct is necessary to effectuate state policy. *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978); *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975).[9]

[3] Defendants' strongest case for immunity lies with their pricing practices for terminal equipment. As defendants correctly point out, the DPUC has actively exercised its regulatory authority over SNET's pricing practices. De-

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[9]This formulation of the test for determining state action immunity for private parties is somewhat dissimilar from that set forth by Judge Daly. The principal difference is that this Court finds that a necessary element of state action immunity in these circumstances is that the state compel the anticompetitive act. Judge Daly, relying on *Mobilfone of Northeastern Pa., Inc. v. Commonwealth Tel. Co.*, 571 F.2d 141, 144 (3d Cir. 1978), apparently found no such requirement.

The fact that courts have differed in considering the appropriate test for determining state action immunity is hardly surprising. The Supreme Court's recent decisions in this area *Goldfarb, Cantor, Bates, and Lafayette* are confusing at best. "The . . . issue raised by this . . . quartet of decisions is whether anyone can make sense of what the Supreme Court is letting us know about the state action doctrine." M. Handler, *Antitrust 1978*, 78 Colum.L.Rev. 1363, 1376 (1978).

fendants presented a great deal of evidence on this point through the testimony of SNET officers, as well as the former DPUC Chairman. The substantially unrebutted testimony demonstrated that the DPUC actively regulated SNET's pricing practices through, *inter alia*, extensive hearings on rate proposals and rate applications, investigations into SNET proposals, day-to-day supervision of SNET's affairs, detailed analyses of SNET's pricing methodologies and payment options, and specific approval of much of the conduct that the jury found to be anti-competitive.

Based on this, defendants appear to make two arguments. First, they argue that immunity is necessitated for the pricing practices because such practices are actively regulated by the DPUC under a public interest standard that is fundamentally inconsistent with the antitrust laws. This argument was specifically rejected by the Supreme Court in *Cantor v. Detroit Edison Co.*, *supra*, 428 U.S. at 595, 96 S.Ct. at 3119, and by Judge Daly in his ruling on the motion to dismiss. *Northeastern* at 263. The evidence adduced at trial does not compel a contrary result.

Second, defendants argue that the jury verdict will place SNET in the position of being told by this Court that its pricing practices and payment options were illegal at a time when they were still contained in a tariff by which it was under a legal obligation to abide. In short, they claim the verdict will "leave SNET like a trapped chess piece — vulnerable where it is but blocked from moving to safety."

This assertion may well be true. Yet, it is clear that this is a situation of defendants' own making. Defendants have engaged in conduct which a jury has found to be anticompetitive under the antitrust laws. It is conduct which defendants initiated and engaged in at their own instance, and

which was simply approved by the DPUC. There was no evidence adduced at trial which demonstrated that the DPUC in the first instance compelled SNET or the other defendants to file tariffs containing rates which were predatory or payment plans which were anticompetitive. Although the tariffs were filed at the direction of the DPUC, and could not be changed without their approval, the anticompetitive conduct was primarily the result of defendants' independent business judgment. *Cantor v. Detroit Edison Co., supra*, 428 U.S. at 593-94, 596, 96 S.Ct. at 3118-3119, 3120. The evidence of the DPUC's regulation over SNET's affairs is evidence again more properly directed to liability, that is, to the reasonableness of its conduct.

Having found no state action immunity for the pricing practices engaged in by defendants, it follows that there can be no immunity for the other areas of anticompetitive conduct which are regulated, if at all, to a much lesser degree. *Northeastern* at 264 n.24.

II

THE EVIDENCE

Having determined that defendants are not immune from the antitrust laws, the Court now turns to a consideration of whether the evidence presented at trial was sufficient to support the jury's verdicts. The standard in this circuit for judgment *n. o. v.* in an antitrust case is well-settled and not in dispute. *See National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953, 956 (2d Cir. 1978). It is sufficient to note for purposes of this case that where there is "evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial

judgment might reach different conclusions, the [motion for judgment n. o. v.] should be denied." *Id. quoting Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969). In this regard, the Court is "bound to view the evidence in the light most favorable to [the plaintiff] and to give [it] the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042 (2d Cir. 1976), *quoting Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696, 82 S.Ct. 1404, 1409, 8 L.Ed.2d 777 (1962).

A. *Monopolization*

Defendants first attack the jury's verdict on the monopolization claim. On this issue, the jury was instructed to answer four questions. Questions 1 and 2 asked whether SNET possessed the power in the relevant market to (1) control prices or (2) exclude competition. Question 3, which had six parts, asked whether SNET maintained monopoly power through predatory or anticompetitive means by the following acts or practices: (a) pricing; (b) protective coupler; (c) advertising practices; (d) marketing; (e) use of utility function; and (f) new products. Question 4 asked whether the anticompetitive acts or practices were the proximate cause of any injury to Northeastern. The jury answered "yes" to all questions.

[4] Monopolization requires proof of two elements: the possession of monopoly power in the relevant market; and the deliberate and unlawful acquisition or maintenance of that power. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 86 S.Ct. 1698, 1703-1704, 16 L.Ed.2d 778 (1966). The requisites of monopoly power are well understood as "the power to control prices or exclude competition."

United States v. E. I. duPont de Nemours & Co., 351 U.S. 377, 391, 76 S.Ct. 994, 1004, 100 L.Ed. 1264 (1956). "Section 2 . . . is aimed primarily not at improper conduct but at a pernicious market structure in which the concentration of power saps the salubrious influence of competition." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 272 (2d Cir. 1979.)

Defendants apparently do not seriously contest the jury's findings that SNET had monopoly power, that is, the power to control prices or to exclude competition in the terminal equipment market in the State of Connecticut. Accordingly, extended discussion of this aspect of the monopolization claim is not warranted. It is sufficient simply to note that the evidence on, *inter alia*, market structure,[10] SNET's ability to retain a high percentage of the market with equipment far inferior to that offered by Northeastern and others, and the inability of a high percentage of interconnect companies to survive in the Connecticut market,

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[10]Defendants argue that market share statistics in the context of a regulated utility which had 100% of the market in 1968 are meaningless in determining whether SNET possessed monopoly power. On the contrary, market structure in the relevant market, though not an absolute talisman, is an indicia of monopoly power. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). It is uncontroverted that more than ten years after the *Carterfone* decision, SNET still maintains over 90% of the relevant market, whether measured by number of systems or by revenues. The jury could properly consider these figures on the question of monopoly power.

Defendants' argument is further undercut by the charge to the jury which stated that "if a company has an increasing share of the revenue of the relevant market from one year to the next over a period of years, that has been seen as evidence of monopoly power, while a declining share has been seen as evidence of the lack of monopoly power. In this connection, you may consider that SNET in our situation started with 100% of the market share as of 1968."

amply supported the jury's findings that SNET had the power to control prices *and* to exclude competition.

As the case was put to the jury, the overriding issue common to each of Northeastern's claims was whether defendants had engaged in anticompetitive or predatory conduct. Because the bulk of the evidence related to the conduct issue, the primary thrust of defendants' motion is directed to the sufficiency of the evidence relating to each of the six areas of conduct. Thus, it is to this second element of monopolization — acquisition or maintenance of monopoly power by anticompetitive or predatory means — that the Court now turns.

In *Berkey v. Kodak, supra*, the court noted that "a monopolist is permitted, and indeed encouraged, by § 2 to compete aggressively on the merits, ..." *Id.* at 281. On the other hand, the court stated that a firm with monopoly power "must refrain at all times from conduct directed at smothering competition." *Id* at 275. Against these standards, the jury was instructed to analyze whether the various acts or practices alleged by Northeastern were merely instances of aggressive competition, which is encouraged, or were instances of anticompetitive or predatory conduct, which is prohibited.

Defendants do not contest the fact that some evidence was offered on each of the six areas of conduct. They argue instead that the evidence does not satisfy the applicable standards for determining whether an act or practice is anticompetitive or predatory. The Court finds, however, that Northeastern has offered sufficient evidence on each of the six areas of conduct from which the jury could reach the verdicts it did. Because of the importance of

the pricing and PCA claims, the Court will examine the evidence offered on each in some detail.

1. *Pricing.*

The heart of Northeastern's case is its pricing claims. The pricing claims have two aspects: first, that SNET's rates for terminal equipment were predatory; and second, that two-tier pricing was anticompetitive.

[5] As they did at the time of trial, defendants again urge this Court to adopt a marginal or incremental cost standard for determining whether they have engaged in predatory pricing. They argue that if a price recovers the marginal or incremental costs of a product or service — those costs which vary with the introduction or volume of that product or service — it is not predatory. This is a standard which has been adopted, with various modifications, by a number of courts and commentators. *E. g., Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427 (7th Cir. 1980); *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727 (9th Cir. 1979); *Pacific Engineering & Production Co. of Nevada v. Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879, 98 S.Ct. 234, 54 L.Ed.2d 160 (1977); Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv.L.Rev. 697 (1975).

Absent guidance from the Second Circuit, this Court again declines to adopt that standard on the particular circumstances of this case. Instead, defendants' pricing conduct will be viewed against a pricing floor of fully distributed cost. *See* Areeda & Turner, *Antitrust Law* ¶ 714, at 159-64 (1978); Baumol & Walton, *Full Costing, Competition and*

Regulatory Practice, 82 Yale L.J. 639 (1973). Fully distributed cost combines the marginal or incremental cost of supplying a particular good or service with some portion of the unattributable costs (i. e., indirect costs). Such a standard is particularly appropriate for a firm like SNET which sits astride noncompetitive and competitive markets and has the potential to "undermine competition by supporting artificially low prices in the terminal-equipment market with revenues from intrastate monopoly services." Note, *Competition in the Telephone Equipment Industry*, 86 Yale L.J. 538, 550 (1977).

One of the indicia of predatory pricing posited by Areeda & Turner is whether a firm has engaged in the "deliberate sacrifice of present revenues for the purpose of driving rivals of the market and then recouping the losses through higher profits earned in the absence of competition." Areeda & Turner, 88 Harv.L.Rev. at 698. Although such a test may be appropriate for the normal industrial firm which is in a competitive situation in all sectors of its business, it is not appropriate for an entity like SNET which can support artificially low prices in the terminal equipment market with revenues from monopoly services. To permit SNET to allocate all or a disproportionate percentage of its unattributable costs to the noncompetitive sector of its business — which defendants urge this Court to do under the guise of long-run incremental analysis ("LRIA") — is to give defendants an improper pricing advantage over Northeastern and other single market competitors who must allocate all costs directly to their terminal equipment rates. A fully distributed cost standard, on the other hand, would require that the rates for SNET's competitive products and services reflect some portion of its unattributable costs, thus substantially curtailing potential subsidization. Under the par-

ticular circumstances of this case, a fully distributed cost pricing floor is the proper standard against which to measure defendants' pricing practices.

The evidence submitted to the jury on the predatory pricing issue can be divided into two segments: the evidence concerning KTS rates and the evidence relating to PBX rates.

Plaintiff introduced no direct cost evidence at all as to 1A key system rates. Instead, it relied solely on the claim that such rates remained constant between 1972 and 1977, a period of sharp inflation. Similarly, with respect to Com-Key rates, plaintiff relied simply on the evidence that these rates were not raised during the period from 1974 to 1977. In conjunction with this evidence, plaintiff offered evidence that SNET's costs on a company-wide basis increased about 60% during the relevant period. Finally, plaintiff points to a statement in a confidential report concerning competition in the interconnect business prepared by the SNET marketing department in February, 1973 that the April, 1972 general rate increase made SNET's rates for key telephone systems more competitive.

This evidence cannot support the inference that SNET's KTS rates were below cost and thus predatory. Even discarding all the evidence offered by defendants concerning the setting of these rates, such as the use of an inflation factor, the jury could not have found that the rates were predatory. *See William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 461 F.Supp. 410, 417 (N.D.Cal. 1978); *Murphy Tugboat Co. v. Crowley*, 454 F.Supp. 847, 854 n.6 (N.D.Cal.1978).

The evidence on whether SNET's PBX rates, principally its rates on Dimension 100 and 400, were predatory was

somewhat more substantial. First, SNET concedes that its rates were based on an incremental pricing standard. Under this methodology, SNET, in setting its rates, took into account only the incremental costs attributable to Dimension and affected by Dimension over a five-year period; it did not attribute any portion of its direct or common costs to the Dimension rates.

Second, the Dimension 100/400 tracking report prepared by SNET in October, 1978 to measure Dimension performance, showed a small negative contribution for 1977, the first year of the Dimension offering. Third, in December, 1975 SNET proposed certain rate levels for its Dimension offerings based on forecasts prepared by SNET rate and marketing personnel. These proposed rates were submitted to officials at AT&T who expressed concern that the rates were so high as to be out of line with AT&T recommendations. After consultations with these officials, SNET prepared a revised forecast, the effect of which was to reduce the burden[11] to be borne by Dimension 100 and 400, and thus reduce the rates for these offerings.

Finally, there is the testimony of Dr. John W. Wilson, Northeastern's expert witness, who stated that based on the Dimension 100/400 tracking report and other studies and cost data, he found the rates for the Dimension offerings to be noncompensatory, that is, less than cost. In this regard, Wilson testified that based on his own analysis and calculations, Dimension 100 was underpriced by 46.73% and Dimension 400 by 9.65%.

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[11]That is, the additional costs that SNET would incur by introducing Dimension, but which are not attributable to the product itself.

[6] The one element lacking from all this evidence is a direct comparison of SNET's rates for its Dimension 100 and 400 PBXs and its fully distributed cost for those products. Although Dr. Wilson made a number of conclusory statements concerning underpricing, he did not offer direct evidence as to SNET's costs in comparison to its rates. In short, the question is whether in the absence of direct evidence demonstrating pricing below fully distributed cost, a jury may nevertheless find that the pricing is predatory. This Court holds that it may. In the present case, the evidence presented on pricing, when taken as a whole, is sufficient to support the jury's verdict that SNET's rates for its Dimension 100 and 400 offerings were below cost, and thus, predatory.[12]

2. *Tier-two Pricing*

Telephone service has traditionally been offered on a service basis under which the customer pays a basic monthly charge and continues to pay that charges as long as the service continues. In apparent response to the variety of payment plans offered by terminal equipment competitors, SNET decided that it needed to adopt some payment plan as an alternative to its monthly "pay forever" plan. This led to the filing of the customized or two-tier payment option tariff.

This payment option permits business customers in Connecticut to pay for service in one of two ways. First, they

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[12]The fact that this Court has determined that SNET's KTS rates were not predatory does not undermine the jury's response to Question 3(a). It is clear from the evidence that the KTS rates did not form the basis for the jury's verdict in Question 3(a), and the Court is "fairly convinced that the jury proceeded on the only sound ground[s]." *Morrissey v. National Maritime Union*, 544 F.2d 19, 27 (2d Cir. 1976).

can elect a month-to-month payment plan under which they are obligated to pay a regular monthly rate for as long as they keep the service. This plan is similar to the way in which SNET's subscribers pay for their basic business or residential exchange telephone service. The second payment plan is the two-tier payment plan. Under this arrangement, the customer makes monthly payments over a term selected by it, which could be from zero to twelve years, depending on the type of equipment involved. These payments are designed to permit SNET to recover its capital outlay. Since this rate is intended to recover SNET's one-time costs, SNET agrees not to request any increases in it for existing customers. SNET recovers the ongoing costs of providing the service, such as repairs and maintenance, by a second monthly charge which continues for as long as the subscriber keeps the service. As these ongoing costs may change, SNET may seek increases in the variable rate. If the subscriber cancels his service before the end of the economic life of the equipment, he recovers a credit for its reuse value to SNET. If cancellation is before the term rate has been fully paid, this credit is reduced by the present value of the unpaid portion of that rate.

Northeastern cannot and does not contend that the two-tier payment plan is *per se* illegal. It argues instead that SNET, on its own and in conjunction with AT&T, introduced and implemented the payment option in a manner which was anticompetitive. That is, Northeastern complains, and the jury found, that SNET adopted the two-tier plan primarily to impede competition rather than as a reasonable business practice to better serve its customers' needs. The evidence on this claim was offered principally through two witnesses: Alfgred W. VanSinderen, President of SNET from

1967 to the present, and Abbott H. Davis, Jr., Vice President of Marketing for SNET from 1973-79.

SNET's major losses to competition in the terminal equipment market during the period from 1971-74 were in the KTS area. Competitors were not a significant factor in the PBX market at that time. In response to the inroads into the KTS market, SNET, in 1974, tariffed ComKey 718 and 1434 and offered them solely under the two-tier option. SNET did not at this time offer the two-tier option with its other KTS offerings (such as the 1A key system) or its PBX offerings.

In 1975 the DPUC granted SNET a general rate increase, the effect of which was to raise significantly the price for PBX equipment. The substantial price advantage that SNET maintained in the PBX market prior to 1975 was lost in the general rate increase, and at that point SNET decided to offer the two-tier option to its PBX customers as well as its KTS customers. In conjunction with the new PBX sales, SNET also approached its existing PBX customers on the conventional monthly tariff for the purpose of encouraging them to convert to the two-tier option.

Finally, in 1977 when it became apparent to defendants that the FCC's registration program was imminent, SNET tariffed a new small key set, the ComKey 416, and offered it pursuant to the conventional and two-tier payment plans. Prior to 1977 there had been little competitive activity in the small key market, because the PCA requirement had made entry into this market economically unfeasible.

Northeastern argues that this evidence demonstrates that SNET's primary purpose in introducing the two-tier plan was its desire to stifle competition, rather than its desire

to serve customer needs. SNET admits that it adopted the two-tier payment option to fight competition, but argues that the payment option was an ordinary marketing practice similar to those practices utilized by competitors and that the antitrust laws do not proscribe lawful conduct which is simply a response to competitive pressures.

In *Berkey Photo, Inc. v. Eastman Kodak Co., supra*, Judge Kaufman stated that, with respect to section 2, two basic principles are clear: first, the "mere possession of monopoly power does not *ipso facto* condemn a market participant;" and second, "to avoid the proscriptions of § 2, the firm must refrain at all times from conduct directed at smothering competition." *Id.* at 275. Implicit in this second principle is a recognition of the fact that conduct which when viewed in a vacuum would appear proper, may be found to be anticompetitive where such conduct is directed at preventing or impeding competition. "[M]any anticompetitive actions are possible or effective only if taken by a firm that dominates its smaller rivals. . . . Such conduct is illegal when taken by a monopolist because it tends to destroy competition, although in the hands of a smaller market participant it might be considered harmless, or even 'honestly industrial.'" *Id.* at 274-75 (citations omitted).

With this in mind, the Court cannot say that the jury's verdict on this aspect of the pricing issue is in error. The evidence is clear that SNET implemented the two-tier payment option solely as a response to the entry of competition in the terminal equipment market. In addition, it is evident that SNET made a concerted effort to have its customers, both new and existing, adopt the two-tier option over the monthly payment option. It takes no great leap of faith

to infer from this conduct that SNET was attempting to insulate its customers from competition through the use of the payment option. Although SNET forcefully argues that the payment plan is no different from the variety of payment plans offered by competitors, *Berkey* is clear that "many anticompetitive actions are possible or effective only if taken by a firm that dominates its smaller rivals." *Id.* In this case, there is sufficient evidence in the record upon which the jury could find that SNET's use of the two-tier payment plan was for the purpose of impermissibly tightening its hold on the relevant market.

3. *Protective Coupler*

In this case, unlike many of the other interconnect cases, *see, e. g.*, fn. 8, *supra*, Northeastern specifically did not attack the PCA tariff itself. Rather, it limited itself to specific allegations concerning the manner in which the PCAs were designed.[13] *Northeastern* at 255.

It is not disputed that the primary purpose of the PCA was to prevent certain types of harm to the network, such as cross-talk and longitudinal imbalance. Yet, Northeastern offered a good deal of testimony from its own witnesses and from defendants' witnesses that the PCAs were overdesigned, making them more expensive than necessary and designed in a way to require modification of non-Bell equipment or to require additional equipment and an external power source on the customer's premises.

The evidence concerning the design of the PCA centered principally on two alleged deficiencies. The first concerned

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[13]Northeastern also contended that there were problems concerning supply and service of PCAs; however, those issues did not go to the jury.

the fact that the PCA required an independent power source and could not operate off line power, the most significant result of this being that a customer would lose phone service in the event of a power outage. Defendants' witnesses admitted that the PCA could have been designed to operate without external power. The second deficiency concerned the fact that certain PCAs had multiple leads which were not compatible with the two-lead terminal equipment provided by Northeastern and others, thus requiring the rewiring of the terminal equipment. Defendants' witnesses again admitted that the PCAs could have been designed without the multi-lead feature. In fact, SNET ultimately did abandon the multi-lead design in favor of the two-lead design. In addition to these two principal charges, there was also evidence concerning loss of signal power, lack of transparency, and redundancy caused by the use of the PCA.

Perhaps the most significant evidence relating to the PCAs was the NAS study referred to previously in Section I. The study listed among its conclusions a number of criticisms of the PCA as it was then designed. These criticisms included, *inter alia*, dependence on an external power source, the redundancy between the functions of the PCAs and those of user-provided equipment, and the lack of transparency. Yet, knowing this in 1970, defendants, as their own witnesses admitted, did not materially change the design of the PCAs from then until 1978 when the registration program commenced. Although defendants put forth a good deal of persuasive evidence concerning the reasonableness of the PCA design, the jury, taking the evidence as a whole, could find that the PCAs were not reasonably designed but were designed for the purpose of impeding competition.

B. *Attempted Monopolization*

Defendants next challenge the jury's verdict finding SNET guilty of attempted monopolization on the ground that Northeastern failed to show specific intent. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 626, 73 S.Ct. 872, 889, 97 L.Ed. 1277 (1953). They argue that there is not sufficient evidence to support an inference of specific intent.[14]

On the contrary, there is overwhelming evidence upon which the jury could base its verdict on this issue. The record contains substantial direct testimony by officials of defendants, including the President of SNET, VanSinderen, that they were opposed to competition in the interconnect market and that they intended to fight it. Similarly, there is documentary evidence which plainly indicates defendants' concern with the inroads of competition and their efforts to retard it. Based on this, the jury could have found specific intent on the part of SNET to monopolize the relevant market. Moreover, the jury was clearly entitled to infer the existence of specific intent from the evidence of SNET's market power and its findings that SNET had engaged in predatory and anticompetitive conduct. *See Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830, 845-46 (9th Cir. 1980); *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 668-70 (9th Cir. 1980).

C. *Conspiracy to Monopolize and to Restrain Trade*

Defendants challenge the jury's verdict on Northeastern's conspiracy claims on the ground that there is insufficient evi-

[14] Although defendants do not raise the issue, the Court finds that the uncontroverted evidence of SNET's 95% plus share of the interconnect market is sufficient to establish "dangerous probability of success." *Ernest W. Hahn, Inc. v. Codding*, 615 F.2d 830, 846 (9th Cir. 1980).

dence to support the conspiracy finding. They argue that the evidence adduced at trial simply reveals cooperation and collaboration among affiliated noncompeting companies, and that such conduct does not run afoul of the antitrust laws. *Beckman v. Walter Kidde & Co.*, 316 F.Supp. 1321 (E.D.N.Y. 1970), *aff'd*, 451 F.2d 593 (2d Cir. 1971), *cert. denied*, 408 U.S. 922, 92 S.Ct. 2488, 33 L.Ed.2d 333 (1972).

[7] It is well established that because a conspiracy is rarely susceptible of direct proof, a party may properly rely upon circumstantial evidence from which a conspiracy violation may be inferred. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939); *Blair Foods, Inc. v. Ranchers Cotton Oil, supra*, at 671; *Ambook Enterprises v. Time Inc.*, 612 F.2d 604, 613-14 (2d Cir. 1979). In the present case, the jury was presented with circumstantial evidence upon which it could reasonably infer the existence of a conspiracy among the defendants. The clearest example of such evidence concerned the resetting of rate levels for the Dimension offering, previously discussed. The testimony of two employees of defendants, Little and Goldstein, showed that AT&T played a significant part in the decision to lower the proposed rate levels established by SNET personnel for the Dimension series.

Furthermore, it is virtually undisputed that AT&T, Western Electric, and SNET jointly participated in planning and implementing many of the areas of conduct that the jury found to be anticompetitive or predatory. For example, the LRIA pricing methodology, the two-tier payment plan, and the PCA were all concepts or products developed by AT&T and adopted by the operating companies such as SNET. Similarly, the testimony of Wilson concerning the Western Electric pricing on PBX and KTS equipment was further

evidence from which the jury could infer a conspiracy among the defendants. In sum, the evidence is sufficient to support the jury's finding that defendants engaged in a conspiracy to monopolize and restrain trade in the relevant market.

D. *Antitrust Injury*

[8] A showing of injury to business is a prerequisite to standing to sue for an antitrust violation. *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977). Defendants argue that Northeastern has not established the fact of injury and that, even if it has, the injury is not cognizable under the antitrust laws.

As defendants correctly point out, fact of injury encompasses two aspects. Northeastern must show that it has actually been injured and that its injury was of an antitrust nature, causally related to defendants' antitrust violations. With respect to the first element, "[the] burden of proving the fact of damage under § 4 of the Clayton Act is satisfied by . . . proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9, 89 S.Ct. 1562, 1571 n.9, 23 L.Ed.2d 129 (1969). With respect to the issue of causation, Northeastern must prove that the injury it incurred is "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra.* Here, "[i]t is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury; . . . " *Zenith Radio Corp. v. Hazeltine Research Corp., supra.*

The record is replete with examples of lost sales or situations from which the jury could infer lost sales as a result of defendants' anticompetitive and predatory conduct. The most striking testimony in this regard was that of Thomas A. Patsiga and Peter H. Oliver, officers of Northeastern, who detailed specific situations in which Northeastern lost sales or were prevented from approaching a particular customer because of the actions of defendants. Moreover, the jury could plainly infer antitrust injury from its finding that SNET had engaged in predatory pricing.

Defendants raise two objections to the sufficiency of the evidence on the injury issue. First, they argue that all the testimony on injury was offered by officers of Northeastern and that as a matter of law, this evidence is insufficient. *See, e. g., H & B Equipment Co. v. International Harvester Co.*, 577 F.2d 239, 247 (5th Cir. 1978), *citing Yoder Brothers, Inc. v. California-Florida Plant Corp.*, 537 F.2d 1347, 1371 & n.25 (5th Cir. 1976), *cert. denied*, 429 U.S. 1094, 97 S.Ct. 1108, 51 L.Ed.2d 540 (1977). Although such a proposition may be true in a situation where the relevant testimony consists of conclusory self-serving statements, that is not the situation in the present case. In this case, the testimony of Patsiga and Oliver, substantially unrebutted, consisted of numerous detailed situations where sales were lost or were not able to be made due to defendants' activities. For example, Patsiga testified that the two-tier pricing plan foreclosed Northeastern from making a number of potential sales. He testified further to the cutover problem, the effect of SNET's advertising and marketing programs, and to the preannouncement of untariffed offerings, in each case relating them to specific customers or potential customers. Similarly, Oliver testified to the inability of Northeastern to

break into the small key telephone market because of the expensive design of the PCA.[15]

[9] Defendants' second objection to the jury's verdict on injury relates to the evidence concerning Northeastern's "spectacular" growth. Defendants argue, apparently, that because Northeastern has managed to be successful against a great number of odds, it cannot claim to have been injured by defendants' conduct. The anomaly in this position is clear. Under this theory, the only person having standing to sue under the antitrust laws would be one who had been driven out of business. Section 4 of the Clayton Act contains no such qualification and defendants have cited no authority to support such an interpretation. Accordingly, the Court finds that the evidence put forth by Northeastern is sufficient to demonstrate that it has been injured in its business and that that injury flowed directly from defendants' anticompetitive and predatory conduct.

III
DAMAGES

[10] Northeastern's proof of damages requires extensive review on the instant motion, in light of the Second Circuit's "reasonable foundation" test. "Although damages may be ascertained from a jury's just and reasonable inference from proof of the wrongful act, its tendency to injure plain-

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[15]Defendants argue that any injury or damage caused by the coupler design was not antitrust injury. However, this is one of the clearest examples of conduct which had "the effect of significantly impairing the ability of rivals to compete." Areeda & Turner, *Antitrust Law* 626, at 80 (1978). The use of an overdesigned and overly expensive PCA in the small key market effectively foreclosed competition, since in that market, the monthly charge for the PCA comprised a significant portion of the overall cost of small key terminal equipment.

tiff's business, and evidence of decline in profits . . . there must nevertheless be a reasonable foundation from which a jury can calculate the amount of damages." *Yentsch v. Texaco, Inc.*, ——F.2d——, at ....., ... n.19 (2d Cir. 1980), slip op. at 2857, 2882 n.19 (May 12, 1980) (citations omitted). The question thus presented is whether Northeastern supplied a rational basis from which the jury could reach the verdict it did. *See Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 297 F.2d 906 (2d Cir.), *cert. denied*, 369 U.S. 865, 82 S.Ct. 1031, 8 L.Ed.2d 85 (1962), *SCM Corp. v. Xerox Corp.*, 463 F.Supp. 983, 1019 (D.Conn.1978), *remanded on other grounds*, 599 F.2d 32 (2d Cir. 1979).

Northeastern's proof of damages was offered through three witnesses: Dr. John W. Wilson, an expert who also testified during the liability portion of the trial; and Gunther Dannheim and Bruce S. Kuryla, officers of Northeastern, who laid the foundation for Wilson's testimony and who likewise had testified previously during the liability phase of the trial. The evidence on damages was reasonably straightforward. Wilson testified first that, based on his studies and calculations, interconnect companies generally would have achieved a one-third share of the relevant market, absent defendants' anticompetitive conduct. From this he then calculated Northeastern's share of the one-third, based on its present share of the interconnect market. Having projected Northeastern's market share, Wilson then computed Northeastern's total lost sales in the PBX and KTS markets.[16] Based on the lost sales figures, Wilson

[16]The figures were as follows: PBXs-211; KTS (3 lines & up)-468; small KTS-305. With respect to the small key calculation, the actual sales plus the projected sales were less than Northeastern's total estimated market share because of preregistration sales losses due to the PCA requirement which was not an issue in this suit.

computed lost sales revenues and arrived at a figure of $19,393,500.[17] Applying a profit factor of 18.98%, Wilson concluded that Northeastern's total lost profit attributable to lost sales from 1972 to 1979 was $3,680,886. Wilson also calculated Northeastern's lost ongoing revenues for the same period as $6,179,976,[18] and again applying an 18.98% profit factor, Wilson concluded that Northeastern's total lost profit attributable to lost ongoing revenues from 1972 to 1979 was $1,172,959.

Finally, Wilson computed Northeastern's loss of going concern value. He did this by combining Northeastern's total lost profit in 1979 attributable to lost sales revenue and lost ongoing revenue ($1,042,894), reducing that figure by 50% to account for estimated taxes, and multiplying the after-tax figure ($521,477) by a factor of six to arrive at a total loss of going concern value of $3,128,682.

Defendants attack Northeastern's proof of damages on three principal grounds. First, defendants argue that Northeastern failed to prove the amount of damages flowing from each separate area of anticompetitive conduct. Second, defendants claim that the damages calculations and conclusions were not based on adequate factual data. Third, defendants contend that Northeastern was not entitled to recover for injury to going concern value.

[11] With respect to the first argument, the Court recognizes that the general rule in an antitrust case is that a

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[17]Again, the breakdown is as follows: PBXs-$15,192,000; KTS (3 lines & up)-$3,774,000; small KTS-$457,500.

[18]This figure was based on a projected number of total lost stations multiplied by $54 per station, an estimated figure as to the amount of revenue each lost station would provide on a yearly basis.

plaintiff must prove the amount of damages flowing from each separate area of anticompetitive conduct. *Van Dyk Research Corp. v. Xerox Corp.*, 478 F.Supp. 1268, 1316 (D.N.J.1979); *ILC Peripherals Leasing Corp. v. International Business Machines Corp.*, 458 F.Supp. 423, 434 (N.D.Cal.1978). *Cf. Berkey Photo, Inc. v. Eastman Kodak Co., supra; SCM Corp. v. Xerox Corp., supra.* In the present case, Northeastern did not attempt to quantify the amount of damages flowing from each of the specific anticompetitive practices forming the basis for the jury's verdicts in the liability phase. Indeed, Wilson admitted that he did not attempt to determine the individual impact of any of the specific anticompetitive or predatory practices.

Nevertheless, this case presents a number of unique factors, not present in *Van Dyk*, *ILC Peripherals*, *Berkey*, and *SCM*, which dictate against finding that Northeastern's failure to allocate damages among the various anticompetitive acts is fatally defective to the proof of damages. What is involved in this action is a single, well-defined, and stipulated relevant market: business terminal equipment in Connecticut. The various acts and practices which the jury found to be anticompetitive at the liability phase of the trial were so closely interrelated as to preclude meaningful individualized consideration of damages. Under these circumstances, it would have required greater speculation on the part of the jury to derive the specific amount of damages attributable to each anticompetitive or predatory act than it would to arrive at a single figure attributable to defendants' overall unlawful conduct in the relevant market.

[12] Relying primarily on *ILC Peripherals* and *Van Dyk*, defendants argue that Northeastern's proof of damages fails to separate the effect of lawful from unlawful competition.

Although those cases are distinguishable from the present case in many respects, the most significant fact is that, unlike the present case, neither *ILC Peripherals* nor *Van Dyk* were bifurcated proceedings. In those cases, if the damages had not been tied to the specific claims of anti-competitive conduct, the jury or the court would not have had a rational basis on which to correlate the damages to the particular conduct found to be predatory or anticompetitive. In the damages phase of the present proceedings, Wilson specifically stated that he was basing his damage calculations on the jury's verdicts on the liability counts. Moreover, the Court in its charge to the jury emphasized the fact that damages could only be based on that conduct which the jury had previously found unlawful. Northeastern's failure to put forth evidence with respect to each anticompetitive or predatory act did not deprive the jury of a rational basis on which to render its damage awards.[19] *Cf. Zenith Radio Corp. v. Hazeltine Research, Inc., supra.*

Defendants also assert that Northeastern's proof of damages was not based on adequate factual data. Specifically, defendants attack Wilson's one-third market share projection and his incremental profit rate calculation.

[13] As stated previously, the Supreme Court has not required antitrust plaintiffs to carry a heavy burden with respect to a showing of the amount of damages. *Zenith Radio Corp. v. Hazeltine Research, Inc., supra,* 395 U.S. at 123-24, 89 S.Ct. at 1576-1577; *Bigelow v. RKO Radio Pictures, Inc.,* 327 U.S. 251, 254, 66 S.Ct. 574, 575, 90 L.Ed.

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[19]The fact that this Court has determined that SNET's KTS rates were not predatory does not change this result. As is clear from the evidence, a lion's share, if not all of the damage suffered by Northeastern in the KTS market was attributable to the two-tier payment option and the design of the coupler.

652 (1946). However, there must be a reasonable foundation from which a jury can calculate such an amount. *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1352-53 (3rd Cir. 1975); *Herman Schwabe, Inc. v. United Shoe Machinery Corp., supra*, at 912-13.

With respect to the one-third market share projection, Wilson relied primarily on three things: a 1973 speech made by Charles Brown,[20] then president of Illinois Bell and now Chairman of AT&T; data concerning other industries; and cross-elasticity studies of two SNET products.

In his speech, Brown projected that by 1980 on a nationwide basis the Bell System would lose one-third to two-thirds of the terminal equipment market to interconnect companies. Based primarily on the Brown speech, Wilson projected that interconnect companies in the relevant market would have achieved one-third of that market. This evidence standing alone would plainly not provide a sufficient basis for Northeastern's proof of damages. Yet, when coupled with Wilson's testimony concerning other industries in which similar monopoly situations existed and his testimony concerning cross-elasticity data from SNET with which he cross-checked his one-third projection, the evidence provided the jury with a rational basis on which to base its verdicts.

With respect to the 18.98% incremental profit rate calculation, defendants argue that the figure is so out of line with Northeastern's actual performance as to be worthless.[21]

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[20]The term "speech" is slightly misleading. The speech was a technical presentation delivered at a Bell System Presidents' Conference.

[21]The incremental profit rate was calculated by first computing the increase in sales ($1,345,776) and the increase in income ($255,419) from 1978 to 1979 and then dividing the sales figure into the income figure.

Defendants' argument fails on several points. First, to the extent that defendants complain that the 18.98% figure is completely out of line with Northeastern's actual performance, they overlook the fact that Northeastern's actual results were not a valid comparison, because Northeastern was operating in a market where a monopolist was engaging in anticompetitive and predatory conduct. Second, defendants confuse incremental profit rate and net profit. It is undisputed that Northeastern's actual net profits from 1972 through 1979 averaged less than 5% and that its highest net profit year reached only 14%. Moreover, the 18.98% figure is not a calculation of net profits. Rather, the figure represents the profit rate on lost sales. As Northeastern correctly notes, net profit on the total of actual sales and projected lost sales would be considerably less than 18.98%. Finally, to the extent defendants attack Wilson's accounting expertise or his methodology for calculating incremental profit rate, these are matters better left to cross-examination and rebuttal. In fact, defendants did extensively cross-examine Wilson and did produce their own expert witness, Mr. Richard Crane, a CPA, who challenged many of the premises and assumptions underlying Wilson's methodology. Whether the 18.98% profit rate provided a valid basis for the determination of damages was a question properly left to the jury, and this Court will not disturb the verdict on that ground.

[14] Lastly, defendants contend that Northeastern was impermissibly awarded damages for both past lost profits and injury to going concern, arguing that the awards overlap. However, defendants have made no showing that the awards do in fact result in duplication. Although there is a scarcity of authority on this precise point, the Court finds that an antitrust plaintiff may recover both for past lost

profits and for decrease in going concern value. *Cf. Atlantic City Electric Co. v. General Electric Co.*, 226 F.Supp. 59, 61 (S.D.N.Y.), *appeal dismissed*, 337 F.2d 884 (2d Cir. 1964).

[15] The motion for judgment n.o.v. is therefore denied in all respects.

IV
NEW TRIAL

In the alternative, defendants have moved for a new trial on three grounds: (1) that the verdict is against the weight of the evidence; (2) that the Court committed errors in the charge to the jury; and (3) that jury prejudice existed because of an unfair juror selection process.

The first ground need not long detain the Court. The evidentiary support for the jury's verdict was discussed in Section II, *supra*, and will not be repeated here. Even were this Court to "reweigh" the evidence and make its own independent determination, as defendants urge, *see* 11 Wright & Miller, Federal Practice and Procedure § 2806, at 43-45, the Court finds that the verdicts reached by the jury are not contrary to the weight of the evidence. Defendants' argument that the Court should order a remittitur, *see Berkey Photo, Inc. v. Eastman Kodak Co.*, *supra*, at 305, is also without merit. As stated previously in Section III, *supra*, Northeastern's evidence on damages provided a rational basis from which the jury could reach the verdicts it did. Having said this, the Court cannot now say that these damages are so excessive as to warrant remittitur.

Defendants contend that errors in the charge to the jury after the liability phase of the trial prevented a proper

verdict. The substance of defendants' objections has been ruled on by this Court previously on the record and in other contexts in this opinion. No purpose would be served by reexamining any of these rulings except the Court's charge on the role of regulation in assessing the reasonableness of defendants' conduct.

During the pendency of defendants' motion for judgment n.o.v., the Fifth Circuit Court of Appeals handed down its decision in *Mid-Texas Communications Systems, Inc. v. American Telephone & Telegraph Co.*, 615 F.2d 1372 (5th Cir. 1980), which involved an action by an independent telephone company against certain members of the Bell System. Plaintiff, a corporation formed for the purpose of providing telephone service within a residential development outside Houston, Texas, based its suit primarily on the refusal of Southwestern Bell to provide toll interconnection of the proposed telephone facility with the Bell System. The Fifth Circuit reversed a jury treble damage award and remanded the case to the district court for a new trial. Although the facts of that case are distinguishable (it involved interconnection between carriers, instead of between a carrier's lines and equipment provided by the customer) defendants contend that the Fifth Circuit's discussion of the importance of regulation in the context of jury instructions is relevant. Defendants argue that this Court improperly downgraded the role of regulation played by the FCC and the DPUC.

Mid-Texas is distinguishable from the present case on two significant grounds. In this case the Court, unlike the district court in *Mid-Texas*, instructed the jury on five separate occasions that the defendants were regulated by the FCC and the DPUC, and that the jury could consider

such regulation in assessing the reasonableness of defendants' conduct. In *Mid-Texas*, the district court in its charge to the jury did not once discuss the role of regulation.

[16] *Mid-Texas* is distinguishable on a second and more fundamental ground. The Fifth Circuit in *Mid-Texas* first found that AT&T and Southwestern Bell did not enjoy a general implied immunity from the antitrust laws based on state and federal regulation over interconnection and related matters. Nevertheless, the court then stated that "if [Southwestern Bell's] purpose in refusing interconnection was to vindicate the public interest, then the refusal, despite its obvious anticompetitive effect, would have been proper and entitled to protection from antitrust scrutiny." Does this decision mean that a specific course of conduct approved by a regulatory body, as being conduct in the "public interest," falls outside the proscription of the antitrust laws? This Court specifically rejected such an argument throughout the trial and in charging the jury. Such an assertion is completely at odds with finding no implied antitrust immunity for defendants' activities, and this Court continues to reject it.

In the present case, it is undisputed that much of the conduct for which defendants were found liable was conduct specifically approved, or at least not disapproved, by either the FCC or the DPUC. Under the standard apparently set forth in *Mid-Texas*, this same conduct, because it passes regulatory muster, would be immune from the operation of the antitrust laws. This Court respectfully disagrees with that position and affirms its earlier ruling on the record concerning the role of regulation in assessing defendants' conduct.

[17] Defendants' final argument on their alternative motion for a new trial is that the jury was not properly representative because of errors in the selection process. Specifically, defendants claim that their right to a trial by a jury drawn "from a fair cross section of the community," 28 U.S.C. § 1861, was denied by the Court's "too liberal granting" of hardship excuses for jurors with an advanced education or a responsible business position. Defendants do not contest the composition of the initial panel.

28 U.S.C. § 1866(c) provides in relevant part that "no person or class of persons shall be disqualified, excluded, excused, or exempt from service as jurors: *Provided*, That any person summoned for jury service may be (1) excused by the court upon a showing of undue hardship or extreme inconvenience." "[U]ndue hardship or extreme inconvenience" is defined in section 1869(j) and includes such things as great distance, grave illness in the family, and emergencies which outweigh "the obligation to serve as a juror." In addition, "in situations where it is anticipated that a trial ... may require more than thirty days of service, the court may consider as a further basis for temporary excuse, severe economic hardship to an employer which would result from the absence of a key employee during the period of such service."

In the present case, twelve jurors were excused pursuant to 28 U.S.C. § 1866(c) on the basis of "undue hardship or extreme inconvenience." Of these twelve, five were excused pursuant to that portion of section 1869(j) concerning economic hardship to an employer. Defendants point out that "a number of those excused had substantial education beyond high school and responsible business positions." This is not disputed. Indeed, of the twelve of the venire excluded,

only one did not finish high school. However, of the twenty-one jurors who remained on the panel after exclusions for cause, from which the petit jury was ultimately chosen, sixteen had high school or post-high school educations. In addition, a number had what defendants broadly term "responsible" business positions. Moreover, there is little basis for concluding that "the well-educated and those with responsible business positions" is a cognizable group whose exclusion would violate the fair cross-section requirement of section 1861. In support of their position, defendants cite *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 66 S.Ct. 984, 90 L.Ed. 1181 (1946). In *Thiel*, the Court held that the deliberate exclusion of persons of a particular economic or social station did violence to the "democratic nature of the jury system." *Id.* at 223, 66 S.Ct. at 987. In the present case, the Court clearly did not deliberately exclude persons of a particular economic or social status. What the Court did do was to exclude those persons from the panel who demonstrated that a six-to-eight week trial would work an undue hardship or extreme inconvenience on themselves or their employers. The fact that in a particular instance hardship or inconvenience may have been occasioned by advanced education or a responsible business position is immaterial.

Defendants' objection to the exclusion of potential jurors who owned AT&T or SNET stock is without merit. *See Chestnut v. Ford Motor Co.*, 445 F.2d 967, 971 (4th Cir. 1971).

Defendants' alternative motion for a new trial is denied.

V
ATTORNEYS' FEES

[18] The procedure to be followed on considering a request for attorneys' fees in a private antitrust action is the lodestar approach, which was developed by the Court of Appeals for the Third Circuit in *Lindy Brothers Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 487 F.2d 161 (3rd Cir. 1973) [hereinafter "*Lindy I*"], and *Lindy Brothers Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (3rd Cir. 1976) (en banc) [hereinafter "*Lindy II*"], and which was subsequently adopted by the Court of Appeals for the Second Circuit, *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974) [hereinafter *Grinnell I*"], and *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093 (2d Cir. 1977) [hereinafter "*Grinnell II*"]. Although *Lindy* and *Grinnell* were class actions, the district courts in this circuit have held that the lodestar approach governs an award of attorneys' fees in ordinary private antitrust actions as well. *E. g., Beech Cinema, Inc. v. Twentieth Century Fox Film Corp.*, 480 F.Supp. 1195 (S.D.N.Y. 1979), *aff'd*, 622 F.2d 1106 (2d Cir. 1980); *Kane v. Martin Paint Stores, Inc.*, 439 F.Supp. 1054 (S.D.N.Y. 1977), *Aff'd mem.*, 578 F.2d 1368 (2d Cir. 1978); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 411 F.Supp. 627 (S.D.N.Y.), *rev'd on other grounds*, 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097, 97 S.Ct. 1116, 51 L.Ed.2d 545 (1977).

The lodestar approach is a two-step process. First, the court computes the lodestar by multiplying the attorneys' hours by reasonable hourly rates. In this case, the parties have stipulated to a lodestar of $498,542.25. Second, where plaintiff's counsel is paid on a contingent fee basis, the court

may adjust the lodestar to account for risk and quality factors.

[19] Adjustments to the lodestar are not granted as a matter of course. Since the lodestar represents a reasonable hourly rate for a reasonable number of hours, an award of the lodestar figure alone fulfills the Clayton Act's provision for "a reasonable attorney's fee." 15 U.S.C. § 15.

[20] The court in *Lindy II* outlined in detail the risk and quality factors that may be considered in adjusting a lodestar figure. With respect to the risk aspect, there are three principal factors which the court may consider to determine whether an increase in the lodestar is warranted: (1) plaintiff's burden; (2) risks assumed by plaintiff's counsel; and (3) delay in receiving payment.

The court may increase the lodestar where plaintiff's counsel has managed a legally and factually complex case and has advanced novel legal theories not suggested by prior civil or criminal proceedings. *Lindy II*, *supra*, at 117; *Grinnell I*, *supra*, at 471. It is true, as defendants point out, that this case was a fairly straightforward antitrust action, and that the trial transcript was not bloated by the introduction of countless exhibits and the testimony of hundreds of witnesses. Yet, the probability of Northeastern successfully establishing liability and proving damages in this case was speculative at best. Contrary to defendants' assertion, Northeastern was not aided in the prosecution of this case through previous judicial and regulatory proceedings. Indeed, this is the first of the many terminal equipment cases of which this Court is aware that has gone to trial. In this connection, Northeastern has twice been required to jump the immunity hurdle, an issue that has been decided in different ways by

the various courts that have considered it. In addition, Northeastern succeeded on its pricing claims, which were difficult to prove and, as this Court noted previously, central to Northeastern's case. In view of the complexity of the principal legal issues and the speculative probability of Northeastern's success, the substantial risk undertaken by Northeastern in developing this case warrants an upward adjustment of 15% to the lodestar.

With respect to the risks assumed by Northeastern's counsel, the Court finds that an additional 15% adjustment is appropriate. Counsel expended a total of 4,572.45 hours in the preparation and trial of this case for a total stipulated fee (lodestar) of $498,542.25. Having taken this case on a contingent fee basis, the risk incurred by counsel is clear. Although the risk is mitigated to some extent by the facts that counsel has been reimbursed for expenses throughout the case and that the case is not a class action, an upward adjustment of 15% merely reflects these mitigating factors.

The fact that counsel arranged to work on a contingent fee basis, and therefore, had to wait until the end of the trial to receive compensation does not justify an additional automatic increase to the lodestar. *Kane v. Martin Paint Stores, Inc., supra*, at 1058. In the present case, the delay in receiving payment was not long, since counsel did the bulk of their work in 1979. Moreover, any delay that did exist is offset by the fact that counsel will be paid at current rates, rather than at rates in effect for years as far back as 1975. The Court finds, therefore, that no adjustment for the delay in receiving payment is warranted.

Courts have allowed both increases and decreases to the lodestar to reflect quality. Since quality is automatically

reflected in the hourly rate, a court may increase the lodestar only where services have been "exceptional" and of a much higher quality than that to be expected from attorneys who are paid at the same hourly rate. *Lindy II*, *supra*, at 118.

There are two factors that the court in *Lindy II* indicated should be considered in determining whether to adjust the lodestar for quality work: the result obtained and the attorney's methods utilized in processing the case. With respect to the first element, the lodestar approach represents an attempt to "minimiz[e] the important role traditionally played by the magnitude of the recovery." *Grinnell II*, *supra*, at 1099 (quoting from *Grinnell I*, *supra*, at 471). Consequently, a successful result in and of itself is not grounds for increasing the lodestar. However, a court may, as this Court elects to do in the present case, adjust the lodestar "to recognize and reward achievements of a particularly resourceful attorney who secures a substantial benefit for his clients with a minimum amount of time invested, ..." *Merola v. Atlantic Richfield Co.*, 515 F.2d 165, 168 (3d Cir. 1975). There can be little doubt that the $16.5 million verdict was a substantial benefit to Northeastern. Although the almost $500,000 in legal fees appears high, the fees are entirely reasonable when viewed in light of the quantity and quality of the work performed in this case. Thus, the Court concludes that a final increase of 20% in the lodestar is appropriate to reflect the result obtained.

Although the Court must also consider, in assessing the quality of the work, the methods used by plaintiff's counsel to process this case, the Court finds no further adjustment warranted. While the Court would be remiss in not praising the attorneys for all parties for the professional and efficient

manner in which they expedited this case, Northeastern's counsel are not entitled to a methods adjustment to the lodestar, in view of what the Court regards as an unnecessarily disproportionate ratio of partner time to associate time. *See Beech Cinema, Inc. v. Twentieth Century Fox Film Corp., supra,* at 1197. In this case almost 90% of the work done on Northeastern's behalf was performed by partners. Much of this work (the preliminary review of documents for instance) could have been carried out as ably by associates or paralegals. Defendants should not be penalized for the conscious decision of plaintiff's counsel as to the management of case preparation responsibilities.

[21] The Court concludes, based on all the factors enumerated above, that an adjustment of 50% in the lodestar is warranted in the present case.[22] Accordingly, it is hereby ordered that Northeastern's counsel be awarded $747,813.38 in attorneys' fees.

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[22]This adjustment is in line with what other district courts in the circuit have awarded. *See, e. g., Michelman v. Clark-Schwebel Fiber Glass Corp.,* 1975-2 Trade Cas. 60,551 (S.D.N.Y.1975) (approximately 14% increase), *appeal dismissed as moot,* 534 F.2d 1036 (2d Cir.), *cert. denied,* 429 U.S. 885, 97 S.Ct. 236, 50 L.Ed.2d 166 (1976); *FLM Collision Parts, Inc. v. Ford Motor Co., supra* (approximately 56% increase). The courts in this circuit have permitted a doubling of the lodestar only in class actions. *See City of New York v. Darling-Delaware,* 440 F.Supp. 1132 (S.D.N.Y. 1977); *In re Master Key Antitrust Litigation,* 1978-1 Trade Cas. 61,887 (D.Conn.1977). The only district court that more than doubled the lodestar was reversed in *Grinnell II. Cf. Seigal v. Merrick,* 619 F.2d 160 (2d Cir. 1980).

In view of the case law that has developed in this circuit, Northeastern's request for a sevenfold adjustment to the lodestar is unrealistic.

VI
CONCLUSION

To summarize, the Court finds: (1) that defendants are not immune from the antitrust laws for any of the conduct for which they have been found liable; (2) that the evidence proffered at trial was sufficient to support each of the jury's verdicts on all liability and damage issues; (3) that there are no grounds for a new trial; and (4) that Northeastern's counsel are entitled to attorneys' fees in the amount of $747,813.38.

It is so ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 762 — September Term, 1980

(Argued April 13, 1981 Decided May 27, 1981)

Docket No. 80-7740

NORTHEASTERN TELEPHONE COMPANY,

Plaintiff-Appellee,

— against —

AMERICAN TELEPHONE AND TELEGRAPH COMPANY; WESTERN ELECTRIC COMPANY, INC.; AND THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY,

Defendants-Appellants.

Before:

KAUFMAN AND KEARSE, *Circuit Judges,*
AND BRIEANT, *District Judge.**

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* Of the United States District Court for the Southern District of New York, sitting by designation.

Appeal from a judgment of the United States District Court for the District of Connecticut, Warren W. Eginton, *Judge*, awarding appellee $16,547,076 in damages and $747,813.38 in attorneys' fees for appellants' multiple violations of the Sherman Act.

Reversed as to five of appellee's six claims of anticompetitive conduct. The remainder of the judgment is vacated and the case is remanded for a new trial on liability and damages only as to appellants' design of the "protective coupler arrangement."

J. ROBERT SHEEHY, Waco, Tex. (Philip E. McCleery, Sheehy, Lovelace & Mayfield, Waco, Texas, and J. Daniel Sagarin, Harrigan, Hurwitz, Sagarin & Rutkin, PC, Milford, Conn., of counsel), *for Plaintiff-Appellee.*

HOWARD J. TRIENENS, New York, N.Y. (Harold S. Levy, William J. Jones, J. Paul McGrath, John M. Goodman, Andrew B. Donnellan, Jr., Frank C. Cheston, Lewis H. Ulman, William J. O'Keefe, Peter J. Tyrrell, Dewey, Ballantine, Bushby, Palmer & Wood, New York, N.Y., of counsel), *for Defendants-Appellants.*

KAUFMAN, *Circuit Judge:*

In *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), this Court plumbed the crosscurrents of Section 2 of the Sherman Act, 15 U.S.C. § 2, holding that dominant firms, having

lawfully acquired monopoly power, must be allowed to engage in the rough and tumble of competition. This case presents us with the opportunity to elucidate and to apply the rationale of *Berkey* in the context of the American telecommunications industry. It presents an antitrust suit brought by Northeastern Telephone Co., a relatively small supplier of telephone equipment, against a mammoth and legendary enterprise — the American Telephone & Telegraph Co. (AT&T). Joined as defendants were Western Electric, the manufacturing arm of the Bell System, and Southern New England Telephone Co. (SNET), the local Bell affiliate serving virtually all of Connecticut.

For much of their existence, these entities have escaped the rigors of competition, sheltered in part by tariffs filed with the Federal Communications Commission (FCC). In 1968, however, the Commission exposed a significant portion of their business to competitive pressures. We are here called upon to apply the teachings of *Berkey* to the actions appellants took in response to this infusion of rivalry. To oversimplify somewhat, the question presented is whether appellants did no more than to engage in vigorous competition, or instead, attempted to subvert the competitive process by unfair or unreasonable means. Because we hold that Northeastern has, for the most part, failed to prove that appellants' conduct exceeded the bounds of competitive properiety outlined in *Berkey*, we reverse the judgment below in several major respects. As to the design of the "protective coupler arrangement" required by appellants for use with Northeastern's telephone equipment, we remand for a new trial on liability and damages.

I.

FACTUAL BACKGROUND AND PROCEEDINGS BELOW

A brief overview of the history of competition in the relevant market is necessary to our analysis of the legal questions raised in this appeal. For many years, customers of Bell System affiliates,[1] including customers of SNET[2] were prohibited from connecting their own terminal equipment into the Bell communications network, even if those items were identical to the equipment supplied by local Bell affiliates. This prohibition, which was embodied in tariffs filed with the FCC, completely foreclosed competition in the terminal equipment market. In 1965, however, at the urging of a federal district court in the Northern District of Texas, the FCC began an investigation into the reasonableness of this practice. Three years later, the Commission invalidated the tariffs, ruling that AT&T's refusal to allow interconnection of customer-provided equipment violated § 201(b) of the Federal Communications Act, 47 U.S.C. § 201(b). Thus was the "interconnect industry" born. *See In re Use of Carterfone Device*, 13 F.C.C.2d 420, *reconsideration denied*, 14 F.C.C.2d 571 (1968).

Many companies were attracted to the new market. Some like Nippon Electronics and International Telephone & Telegraph (ITT) were huge conglomerates; others, like Northeastern Telephone, were diminutive firms. Indeed, Northeastern was among the smallest of the new entrants.

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[1]The Bell System consists of AT&T, Western Electric, Bell Laboratories, and the twenty-three affiliated operating companies that provide local telephone service.

[2]SNET is one of two local affiliates in which AT&T possesses a minority interest.

It was formed by two Connecticut businessmen in 1972 on a total capital investment of $1,000. Its first corporate headquarters were in the basement of an old church, and its founders primarily did maintenance work on equipment sold by ITT. Its revenues that first year were only $70,000. In succeeding years, however, the company expanded dramatically, adding approximately one new office per annum. It is now headquartered in Milford, Connecticut, and its revenue in its seventh year of operation, 1978, exceeded $3,000,000.

The competitive battle between Northeastern and SNET was waged on two fronts; public branch exchanges (PBXs) and key telephones.[3] A PBX consists of three elements: the equipment located on a customer's premises and used to switch calls from one telephone line to another; a switchboard which controls that operation; and the associated telephone sets and wiring. Key telephones, which are a familiar sight in business offices, are equipped with keys or buttons to give the set access to more than one telephone line.

During the first few years of their rivalry, both Northeastern and SNET obtained PBXs from outside suppliers — often Nippon Electronics. But in January 1977, SNET submitted, and the Connecticut Division of Public Utilities Control (DPUC) approved, a tariff enabling the utility to offer two PBXs manufactured by Western Electric — the

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[3]SNET, which is specially chartered by the Connecticut General Assembly and is under the regulatory supervision of the Connecticut Division of Public Utilities Control (DPUC), does not sell or lease equipment to its customers; it provides services pursuant to tariffs. For convenience, however, we will refer to SNET's service offerings as "products."

Dimension 100 and the Dimension 400.[4] These units, particularly the Dimension 400, were well-received by Connecticut businessmen. We are told that SNET marketed over one hundred Dimension PBXs between March 1977 and February 1978.

The competitive environment in the business terminal equipment market, while not fatal to Northeastern's continued survival, was doubtlessly hostile. Metaphorically, Northeastern was a mosquito challenging an elephant. Even in its best year, its annual revenues from all of its operations were less than one-twentieth of the returns SNET earned in the terminal equipment market alone. But similar size disadvantages face any aspiring entrant wishing to dislodge a dominant firm. The antitrust laws assume these risks, and Northeastern must be taken to have accepted them. Appellee alleges, however, it was also the victim of business practices not countenanced by the Sherman Act. Specifically, Northeastern contends that SNET's prices for its Dimension PBXs and its key telephones were predatorily low, and that the customized payment option SNET offered to some of its business customers, the so-called "two-tier payment plan," had anticompetitive effects. Northeastern also complains that other aspects of appellants' activities were intended to stifle competition: their advertising and marketing methods, their introduction of new products, and their use of their monopoly power over telephone service to distort competition in the business equipment market.

Finally, Northeastern challenges conduct related to the revised tariffs AT&T filed in response to the FCC's *Carterfone* decision. After the Commission had invalidated the

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[4]These numerical designations refer to the number of telephone lines each type of PBX could accommodate.

proscription against interconnection of customer-owned terminal equipment in 1968, AT&T proposed tariffs requiring that all such epuipment be interconnected via a "protective coupler arrangement," to be provided, installed, and maintained by the local operating companies at the customer's expense. These couplers were intended to protect the telecommunications network from certain electrical problems that might result from the use of faulty or incompatible equipment. Although several telecommunications firms objected to these tariffs, the FCC allowed them to take effect pending the outcome of a study it had commissioned by the National Academy of Sciences (NAS). The Commission noted, however, that in taking this approach, it was "not giving any specific approval to the revised tariffs." *In re A. T. & T. "Foreign Attachment" Tariff Revisions*, 15 F.C.C.2d 605, 610 (1968), *reconsideration denied*, 18 F.C.C.2d 871 (1969).

The NAS consumed the next four years, from 1968 to 1972, in preparing its report. It concluded, finally, that although the protective coupler requirement was "an acceptable way of assuring network protection," a registration system also merited consideration. Under such a system, the FCC would promulgate minimum specifications designed to protect the telecommunications network from electrical harm. Equipment meeting these standards would be exempt from the coupler requirement, but couplers would still be mandatory for unregistered items. Three years after adopting the NAS report, the FCC implemented this recommendation and invalidated AT&T's post-*Carterfone* tariffs. *See In re Proposals for New or Revised Classes of Interstate and Foreign Message Toll Telephone Service and Wide Area Telephone Service, First Report and Order*, 56 F.C.C.2d 593 (1975); *Second Report and Order*, 58 F.C.C.2d

736, *on reconsideration*, 61 F.C.C.2d 396 (1976), 64 F.C.C.2d 1058, *aff'd sub nom. North Carolina Utilities Commission v. F.C.C.*, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977).

Northeastern does not challenge the legality of the invalidated tariff. It contends instead that the protective couplers were intentionally overdesigned, making them unnecessarily expensive and subject to break down. In particular, Northeastern complains that the couplers required an external power source[5] and that they had six-wire leads while Northeastern's PBXs were designed for two-wire interconnection. These features, Northeastern maintains, unreasonably hampered its efforts to compete in the business terminal equipment market.

Northeastern instituted the present suit in 1975, alleging that SNET, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, had monopolized and had attempted to monopolize the business terminal equipment market in Connecticut.[6] Appellee charged further that SNET, AT&T, and Western Electric had conspired to monopolize that market, also in violation of § 2, and had conspired to restrain trade, in contravention of § 1, 15 U.S.C. § 1.

The case was originally assigned to Judge Daly, before whom appellants moved to dismiss the complaint on the ground that their allegedly anticompetitive conduct was exempt from antitrust scrutiny. Judge Daly denied that motion in November 1978, and, after ten more months of

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[5] As a consequence of this design feature, a Northeastern customer, unlike one using SNET equipment, would lose outside telephone service in the event of a power failure.

[6] The parties have stipulated that this is the relevant product and geographic market for the purposes of this litigation.

preliminary maneuvering, the trial commenced before Judge Eginton and a jury. Two weeks later, Northeastern filed an amended complaint, adding its objections to appellants' Dimension PBX tariffs. By agreement of the parties, the trial was bifurcated.

Northeastern's proof at the liability phase centered on the six types of conduct it alleged to be anticompetitive: pricing, advertising, marketing, introduction of new products, SNET's alleged use of its utility function to impede competition, and appellants' design of the protective coupler. The presentation of this evidence and of appellants' proof in opposition required almost three weeks. When both sides finally rested, the jury was asked to respond to fourteen interrogatories. It returned a verdict for Northeastern on all four of the claims, finding that each of appellants' six challenged activities was anticompetitive. Upon presentation of further evidence on damages, the jury awarded appellee $5,515,692. Of this amount, $3,368,906 was for lost profits; $2,146,786 was for damage to Northeastern's "going concern value." Pursuant to Section 4 of the Clayton Act, 15 U.S.C. § 15, the district court ordered that the amount be trebled, to the sum of $16,547,076.

Appellants then moved for judgment n.o.v. or for a new trial, renewing their claims of antitrust immunity and arguing that Northeastern had not presented sufficient evidence to support the verdict. Judge Eginton denied the motions, holding that except with respect to the evidence concerning SNET's pricing of key telephones, the jury had an ample basis upon which to predicate its findings of liability and damages. He then awarded Northeastern an additional $747,813.38 in attorney's fees, as authorized by 15 U.S.C. § 15. This appeal followed.

II. IMPLIED ANTITRUST IMMUNITY BY VIRTUE OF FEDERAL REGULATION

A threshold question prevents our proceeding directly to Northeastern's Sherman Act claims. Appellants assert that the design of the protective coupler cannot be attacked on antitrust grounds because implementation of the coupler requirement was subject to review by the Federal Communications Commission.[7] It is to this issue that we now turn.

Appellees claim no explicit exemption; it is on a more elusive defense that they base their parry: "implied immunity." This principle represents an effort to resolve the inherent conflict between the Sherman Act's mandate of robust competition and the "public interest" standard underlying governmental regulation of business activity. The touchstone of this analysis is Congressional intent, *see Otter Tail Power Co. v. United States*, 410 U.S. 366 (1972), since the principle is founded on the notion that, in some circumstances, a Congressional delegation of regulatory authority carries with it the implication that the antitrust laws shall not apply to the conduct thus regulated. There are two narrowly-defined situations in which "repeal" of the Sher-

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[7]Appellants also maintain that the remaining areas of conduct challenged by Northeastern — pricing, advertising, marketing, the introduction of new products, and the use of SNET's utility function — are insulated from antitrust scrutiny by the "state action" doctrine first enunciated in *Parker v. Brown*, 317 U.S. 341 (1943). While there is considerable force to the contentions of Northeastern and of the Government as *amicus curiae* that such immunity is unavailable, *see Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 487 F. Supp. 942, 958-59 (S.D.N.Y. 1980), we need not reach this issue in view of our holding that on the facts of this case, none of the charged activities gives rise to antitrust liability. *See* Part III. B. *infra*.

man Act will be inferred: first, when an agency, acting pursuant to a specific Congressional directive, actively regulates the particular conduct challenged, *see, e.g., Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 685-86, 688-89 (1975), and second, when the regulatory scheme is so pervasive that Congress must be assumed to have forsworn the paradigm of competition, *see, e.g., United States v. National Association of Securities Dealers, Inc.*, 422 U.S. 694, 730 (1975); *Otter Tail Power Co. v. United States*, *supra*, 410 U.S. at 373-74. In either case, immunity will not lightly be inferred. "Repeal of the antitrust laws by implication is not favored and not casually to be allowed. Only when there is a 'plain repugnancy between the antitrust and regulatory provisions' will repeal be implied." *Gordon v. New York Stock Exchange, Inc., supra*, 422 U.S. at 682, *quoting United States v. Philadelphia National Bank*, 374 U.S. 321, 350-51 (1963). As a further limitation, "[r]epeal is to be regarded as implied only if necessary to make the [regulatory scheme] work, and even then only to the minimum extent necessary." *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

Beyond setting out these basic principles, cases involving federal regulatory bodies other than the FCC are of limited usefulness in the present inquiry. *See Essential Communications Systems, Inc. v. American Telephone & Telegraph Co.*, 610 F.2d 1114, 1116-17 (3d Cir. 1979); L. Sullivan, Antitrust 743-44 (1977). Whenever claims of implied immunity are raised, they must be evaluated in terms of the particular regulatory provision involved, its legislative history, and the administrative authority exercised pursuant to it. *See Gordon v. New York Stock Exchange, Inc., supra; United States v. Philadelphia National Bank, supra.*

This analysis has been undertaken with regard to the communications industry in several recent and comprehensive opinions, which trace Congressional efforts to regulate this area from their origin in the Mann-Elkins Act of 1910, Pub. L. No. 218, 36 Stat. 539, through the Willis-Graham Act of 1921, Pub. L. No. 15, 42 Stat. 27, to their present incarnation — the Federal Communications Act of 1934, 47 U.S.C. §§ 151-609 (the 1934 Act). *See, e.g., Essential Communications Systems, Inc. v. American Telephone & Telegraph Co., supra*, 610 F.2d at 1116-21; *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 487 F. Supp. 942, 947-50 (S.D.N.Y. 1980). *See also MCI Communications Corp. v. American Telephone & Telegraph Co.*, 462 F. Supp. 1072 (N.D. Ill.), *aff'd sub nom. American Telephone & Telegraph Co. v. Grady*, 594 F2d 594 (7th Cir. 1978) (per curiam), *cert. denied*, 440 U.S. 971 (1979); *United States v. American Telephone & Telegraph Co.*, 461 F. Supp. 1314 (D.D.C. 1978). No purpose would be served by repeating this exegesis here. It is sufficient to state that having conducted an independent review of the 1934 Act and its legislative history, we find that immunity cannot be inferred on either of the two grounds previously discussed. We note first that the Act does not expressly authorize the FCC to approve protective coupler designs that unreasonably restrict competition. *Compare Gordon v. New York Stock Exchange, Inc., supra* (section 19(b)(9) of Securities Exchange Act of 1934 directed Securities Exchange Commission to supervise specific conduct challenged; if not immunized, conduct would have constituted *per se* violation of Sherman Act). While this observation is unsurprising, since protective couplers were unknown in 1934, it does rebut apellants' argument that immunity may be inferred on the basis of specific Congressional authorization.

Appellants' second assertion, that they are entitled to immunity on the vague ground of pervasive regulation, is also without merit. The pervasiveness of a regulatory scheme is not susceptible of precise quantification, *see* 1 P. Areeda & D. Turner, Antitrust Law ¶ 224 (1978). But it is not meant to be, since regulation is not an end in itself; it is only a means of inferring that Congress intended to free the regulated industry from the discipline of competition. The more focused inquiry is whether the industry is so extensively regulated that application of the antitrust laws would be incompatible with the regulatory framework, that is, whether immunity must be inferred to make the system work. *See United States v. National Association of Securities Dealers, Inc., supra* 422 U.S. at 734; *Silver v. New York Stock Exchange, supra*, 373 U.S. at 357.

A brief review of the FCC's treatment of the protective coupler tariff demonstrates that applying the Sherman Act to the matter of coupler design would not frustrate federal regulation of the telecommunications industry. AT&T filed this tariff in response to the FCC's decision barring telecommunications carriers from prohibiting the interconnection of customer-owned terminal equipment. *See Carterfone, supra.* The Commission, realizing that an adequate study of the revised tariff would take several years,[8] allowed it to take effect pending further investigation. It emphasized, however, that "in doing so, we are not giving any specific approval to the revised tariffs." *AT&T "Foreign Attachment" Tariff Revisions, supra*, 15 F.C.C.2d at 610-11. Seven

[8]At that time, the Federal Communications Act empowered the FCC to suspend a proposed tariff for only ninety days. *See* 47 U.S.C. § 204, *as amended*, Pub. L. No. 94-376, § 2, 90 Stat. 1080 (1976). The maximum period of suspension has since been increased to five months. *See id.*

years later, the FCC invalidated the tariff and substituted a registration system which freed equipment meeting certain technical specifications from the protective coupler requirement. That the Commission never approved the protective coupler tariff demonstrates that no conflict will arise between the Federal Communications Act and the antitrust laws if we hold that appellants are subject to antitrust liability for designing the coupler as they did. *See Essential Communications Systems, Inc. v. American Telephone & Telegraph Co., supra,* 610 F.2d 1124. *See also Litton Systems, Inc. v. American Telephone & Telegraph Co., supra.* Accordingly, we reject appellants' claim that the design of the protective coupler escapes scrutiny under the Sherman Act.[9]

III.

NORTHEASTERN'S SHERMAN ACT CLAIMS

A. *Framework for Analysis*

Having demonstrated that appellant's conduct is not beyond the reach of the antitrust laws, we turn to an examination of the proof at trial. In doing so, of course, we must "view the evidence in the light most favorable to [Northeastern] and . . . give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962). *Accord Michelman v. Clark-Schwebel Fiber Glass*

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[9]The potential for conflict between the regulatory and antitrust provisions is further reduced because Northeastern seeks damages only for appellants' past activities. Had it requested an injunction prohibiting appellants from engaging in conduct expressly approved by the FCC, a different question might be presented.

Corp., 534 F.2d 1036, 1042 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976). But the jury's fact-finding power is not without limit. If, after drawing all reasonable inferences in favor of Northeastern, we are unable to conclude that the jury had a rational basis for its verdict, it is our duty to reverse the judgment entered on the jury verdict below. *Michelman, supra*, 534 F.2d at 1042. *See Berkey Photo, Inc. v. Eastman Kodak Co., supra*, 603 F.2d at 289.

As previously discussed, four claims went to the jury: SNET was accused of (1) monopolizing and (2) attempting to monopolize the business terminal equipment market, and, in conjunction with AT&T and Western Electric, was alleged to have (3) conspired to monopolize and (4) conspired to restrain trade. Although at trial appellants contested every element of these four claims, they have now focused their attack on Northeastern's assertions of anticompetitive conduct. Accordingly, we will assume that SNET possessed monopoly power in the contested market. We proceed to explain how, on the facts of this case, a conclusion that appellants' activities were not anticompetitive would absolve them of liability under all four claims.

1. *Monopolization*

Although monopoly power is the essence of a § 2 violation,

> [t]he mere possession of monopoly power does not *ipso facto* condemn a market participant. But, to avoid the proscriptions of § 2, the firm must refrain at all times from conduct directed at smothering competition. This doctrine has two branches. Unlawfully acquired power remains anathema even when

> kept dormant. And it is no less true that a firm with a legitimately achieved monopoly may not wield the resulting power to tighten its hold on the market.

Berkey Photo, Inc., supra, 603 F.2d at 275. *See United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *SCM Corp. v. Xerox Corp.*, No 79-7017, slip op. at 1813, 1833-34 (2d Cir. Mar. 12, 1981).

While Northeastern contends that the appellants' monopoly power was "illegally obtained," and depicts the Bell System as the epitome of the slothful monopolist, it did not undertake to prove this contention to the jury. Instead, Northeastern vigorously asserts that, having become monopolists, by whatever means, appellants attempted to smother competition. Thus, the second branch of the *Berkey* holding is applicable: to succeed on its monopolization claim, Northeastern must show that SNET's business practices were an exercise of its power over the market.

2. *Attempt to Monopolize*

Anticompetitive or exclusionary conduct is unquestionably a necessary element of a § 2 attempt. *See, e.g. Swift and Co. v. United States*, 196 U.S. 375, 396-402 (1905). *See generally* 3 P. Areeda and D. Turner, Antitrust Law ¶¶ 820, 825-30 (1978). Moreover, the conduct requirement is arguably the most important single aspect of this offense. Proof of unlawful conduct may be used to infer specific intent to monopolize, *see California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 737 (9th Cir. 1979), and, when coupled with proof of monopoly power, it may satisfy the

requirement that the attempt have a "dangerous probability of success," *see id.*

Because section 2's prohibition of attempts to monopolize encompasses conduct by firms lacking monopoly power, L. Schwartz & J. Flynn, Antitrust and Regulatory Alternatives 12 & n.13 (5th ed. 1977), its potential reach is broader than the proscription against monopolization. But on the facts of this case, where SNET's power to control prices and to exclude entry is no longer an open question, the two offenses are coterminous. To prove either violation, Northeastern must demonstrate that SNET engaged in anticompetitive behavior.

3. *Conspiracy to Monopolize and to Restrain Trade*

The essence of these offenses is an agreement entered into with the specific intent of achieving monopoly or unreasonably restraining trade. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 252 (1940); *United States v. United States Gypsum Co.*, 600 F.2d 414, 417 (3d Cir.), *cert. denied*, 444 U.S. 884 (1979). The Sherman Act "does not make the doing of any act other than the act of conspiring a condition of liability." *Nash v. United States*, 229 U.S. 373, 378 (1913). Thus, anticompetitive conduct is not indispensable in proving a § 1 or § 2 conspiracy. But it is frequently impossible for a plaintiff to obtain direct evidence of the alleged conspirators' specific intent. In such situations, the finder of fact must be allowed to infer defendants' intent from their anticompetitive practices. Such is the case here. Northeastern has not directed our attention to any unequivocal evidence of appellants' specific intent to monopolize or unreasonably to restrain trade. Instead, it points to documents circulated among

the corporations of the Bell System and to testimony of Bell employees. These show only that appellants wanted to win the competitive struggle. This desire, without more, is not unlawful. *See Berkey Photo, Inc., supra.* The crucial question is whether appellants specifically intended to vanquish their opposition by unfair or unreasonable means. Northeastern's direct evidence is insufficient, by itself, to enable the jury rationally to conclude that appellants possessed the requisite intent. But because we are to draw all reasonable inferences in appellee's favor, *see Continental Ore Co., supra*, 370 U.S. at 696, we must uphold the verdict if we find that Northeastern presented circumstantial evidence of intent, *i.e.*, that appellants engaged in anticompetitive conduct. Thus, on these claims as well, Northeastern can prevail only if appellants' business practices are determined to be exclusionary.

We come, at last, to grips with that question.

B. *The Evidence*

1. *Pricing*

We consider first the instances of allegedly anticompetitive behavior that the district court properly described as the "heart of Northeastern's case" — the pricing claims. Three such claims went to the jury: that appellants' PBX and key telephone rates were predatory and that two-tier pricing was anticompetitive.[10]

[10]The jury was not asked to consider these issues separately. Judge Eginton, in ruling on appellants' motion for judgment notwithstanding the verdict, concluded there was insufficient evidence that the key telephone rates were below "cost." The court nevertheless refused to set aside the verdict, professing certainty that the jury did not base its finding of liability on that evidence. In view of our disposition of the other two pricing claims, we need not decide whether this conclusion was erroneous. Moreover, because Northeastern did not cross-appeal from the judgment below, the issue of the lawfulness of those rates is not before us.

a. *SNET's PBX rates*

Although the term "predatory pricing" lacks a precise economic meaning, *see* Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 Yale L.J. 1, 26 & n.50 (1979), courts and commentators have generally defined predation as "the deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition." 3 P. Areeda & D. Turner, *supra*, ¶ 711b, at 151.[11] *See, e.g. International Air Industries, Inc. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). Detailed economic analysis of this behavior is of comparatively recent vintage, gaining wide recognition only in 1975, with the publication of Areeda & Turner's incisive article. *See* Areeda & Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697 (1975). This approach involves a comparison of a monopolist's prices and expenditures, and necessarily entails an understanding of the various economic costs that confront a firm. These expenses fall into two rough categories — variable costs, those which fluctuate with a firm's output, and fixed costs, those which are independent of output. Variable costs typically include such items as materials, fuel, labor, main-

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[11]Predation may also refer to a monopolist's practices of "selling at a loss" to discipline smaller rivals for undercutting the monopoly price. *See* 3 P. Areeda & D. Turner, Antitrust Law ¶ 711a, at 151 n.5 (1978). As in the first case, the predator expects to recoup his losses once the disciplinary period is over.

Northeastern has not accused appellants of this type of predatory conduct, acknowledging, presumably, that because they are subject to regulation, they lack the pricing flexibility necessary to respond quickly to the price reductions of rebellious firms.

tenance, licensing fees, and depreciation occasioned by use. The sum of all variable costs divided by output yields average variable cost. Fixed costs generally include management expenses, interest on bonded debt, the rate of return necessary to attract and maintain equity investment, irreducible overhead, and depreciation occasioned by obsolescence.[12] The sum of the firm's fixed and variable costs divided by output equals average cost. By definition, average cost exceeds average variable cost at all levels of output. *See* 3 P. Areeda & D. Turner, *supra*, at ¶¶ 712, 715c.

Marginal cost, unlike the categories just defined, cannot be determined using data generated by conventional accounting methods; it is an economist's construction. It is traditionally defined as "the increment to total cost that results from producing an additional increment of output." *Id.* ¶ 712, at 155. In most industries, marginal cost is low at low levels of output. It may decline slightly as output increases, but soon reaches a minimum, and then increases continuously with further increases in production. Thus, at low output levels, it is less than either average variable cost or average cost. At high levels, it is greater than either.[13]

The legal question thus arises: what measure of cost should be used in determining whether a monopolist's prices are unremunerative, and hence predatory? This question

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[12]Whether a particular expense, *e.g.*, the cost of a new factory, should be classified as variable or fixed depends in part on the time period under consideration. Over the short run, such an expense would be independent of output and hence fixed. In the long run, it would be classified as variable. Indeed, all costs are variable in the long run. *See* 3 P. Areeda & D. Turner, *supra*, ¶ 712, at 155-56.

[13]The relationships among marginal cost, average cost, and average variable cost are depicted graphically in Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 701 n.14 (1975).

must be approached with an understanding of the goals of antitrust law and an appreciation of the limits imposed by the judicial process. When Congress passed the Sherman Act in 1890, it "engraved in law a firm national policy that the norm for commercial activity must be robust competition." *Berkey Photo, Inc., supra*, 603 F.2d at 272. Thus, should a conflict arise in a particular case between the desire to preserve the competitive process and the wish to rescue a competitor, courts must favor competition. Indeed, so pervasive is this principle that in spite of the law's abhorrence of monopoly, even monopolists must not, without more, be flatly forbidden from competing. *See id.* at 273-75.

Adopting marginal cost as the proper test of predatory pricing is consistent with the pro-competitive thrust of the Sherman Act. When the price of a dominant firm's product equals the product's marginal costs, "only less efficient firms will suffer larger losses per unit of output; more efficient firms will be losing less or even operating profitably."[14]

[14]It may seem incongruous that a more efficient firm may lose money at the monopolist's lawful price, *see In re International Business Machines Corp. Peripheral Electronic Data Processing Devices Antitrust Litigation*, 481 F. Supp. 965, 991-95 (N.D. Cal. 1979) (dictum); Comment, *Draining the* Alcoa *"Wishing Well": The Section 2 Conduct Requirement after* Kodak *and* Calcomp, 48 Ford. L. Rev. 291, 317-20 (1979). But these losses are unlikely to have any serious anticompetitive effects. If the monopolists' marginal-cost price is below its average cost, not only will it be incurring greater losses per unit of output than the more efficient firm, but it will suffer those losses over a much greater range of output, since it will be making the vast majority of sales in the market. That the monopolist will suffer more than its rival will tend to negate whatever competitive benefits the monopolist may derive from its presumably superior wealth. Moreover, since the monopolist will have to raise his price eventually, the rival has a strong incentive to stay in the market, because its profits will exceed those of the monopolist at the new, higher price. *See generally* McGee, *Predatory Pricing Revisited*, 23 J. L. & Econ. 289, 295-97 (1980). Finally, the average cost rule that some commentators would apply in this situation has serious flaws of its own. *See* note 19 *infra*.

Areeda & Turner, *supra*, 88 Harv. L. Rev. at 711. Marginal cost pricing thus fosters competition on the basis of relative efficiency. Establishing a pricing floor above marginal cost would encourage underutilization of productive resources and would provide a price "umbrella" under which less efficient firms could hide from the stresses and storms of competition. Moreover, marginal cost pricing maximizes short-run consumer welfare,[13] since when price equals marginal cost, consumers are willing to pay the expense incurred in producing the last unit of output. At prices above marginal cost, *per contra*, output is restricted, and consumers are deprived of products the value of which exceed their costs of production.

Finally, in choosing among the various tests that commentators have proposed to detect predatory pricing, we must be mindful both of the limits of the judicial process and the realities of the marketplace. Courts occasionally err in apply-

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[13]Areeda & Turner's concern over maximizing short term as opposed to long term welfare has provoked considerable criticism. *See, e.g.*, Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv. L. Rev. 869 (1976); Scherer, *Some Last Words on Predatory Pricing, id.* at 901; Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 Yale L. J. 284 (1977). Maximizing consumers' welfare over the long run is the theoretically preferable solution, as Areeda and Turner concede. *See* Areeda & Turner, *Scherer on Predatory Pricing: A Reply*, 89 Harv. L. Rev. 891, 896-97 (1976). But we despair that economists will ever formulate workable criteria for reaching this goal. Certainly Scherer's approach cannot be applied in a judicial setting. *See Janich Brothers, Inc. v. American Distilling Co.*, 570 F.2d 848, 857 n.9 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); McGee, *supra*, at 306-07.

Furthermore, this case does not present us with a stark choice between long run and short run welfare maximization, since SNET did not set its prices solely with respect to short term marginal costs. Instead it took such "long-term" items as the return on investment into consideration in formulating its PBX tariffs. *See* note 19 *infra*.

ing even the clearest legal rules. The more complicated the standard, the greater the chance for misapplication. Especially when the costs of a misjudgment are high and the prevalence of the conduct the law seeks to deter is low, simpler rules are preferable. *See generally* Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213 (1979). So it is here.

Predatory pricing is difficult to distinguish from vigorous price competition. Inadvertently condemning such competition as an instance of predation will undoubtedly chill the very behavior the antitrust laws seek to promote. Whether this risk is worth running depends in part of the prevalence of truly predatory conduct. There is considerable evidence, derived from historical sources and from economic teaching, that predation is rare. *See* 3 P. Areeda & D. Turner, *supra*, ¶ 711a, at 150-52; McGee, *Predatory Pricing Revisited*, 23 J. L. & Econ. 289, 290-300 (1980). Indeed, nowhere in the recent outpouring of literature on the subject to commentators suggest that such pricing is either common or likely to increase. This does not mean, of course, that this behavior should no longer be deemed anticompetitive. But the rarity of the phenomenon informs our decision as to the appropriate legal definition.

We agree with Areeda and Turner that in the general case at least, the relationship between a firm's prices and its marginal costs provides the best single determinant of predatory pricing. Thus, prices below reasonably anticipated marginal cost will be presumed predatory,[16] while prices

[16]Areeda and Turner would create an exception to the prohibition of below marginal cost pricing when a firm's prices exceed its average costs, a situation that can only arise when the firm is operating at output levels above capacity. This exception has been

(Continued on next page)

above reasonably anticipated marginal cost will be presumed non-predatory. *See* 3 P. Areeda & D. Turner, *supra*, ¶ 711d, at 153-54. And because marginal cost cannot be determined from conventional accounting methods, we will use average variable cost as its surrogate. *Accord, Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427, 432 (7th Cir. 1980); *Janich Brothers, Inc. v. American Distilling Co.*, 570 F.2d 848, 858 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1358 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *International Air Industries, Inc. v. American Excelsior Co., supra*, 517 F.2d at 724.

Were this a run-of-the-mill case we would proceed to apply the average variable cost rule to SNET's PBX prices. But as Northeastern rightly contends, this case is far from typical. Indeed, two significant factors separate this from the classic situation: SNET offers more than one product and is regulated by the DPUC.

That SNET is a multi-product firm seems to enhance the likelihood that it would profit from a policy of predatory pricing. One might assume that while SNET leased its PBXs at unremunerative rates, it would subsidize its losses with profits earned in other areas of its business. But although subsidization may stave off bankruptcy, it does not appreciably reduce the short-run costs of predation. In terms of lost profits, or in economic jargon "opportunity costs,"

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strongly criticized. *See* Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv. L. Rev. 869, 871-75 (1976). Fortunately, we need not resolve this highly technical issue, since Northeastern does not allege that SNET's marginal costs were above its average costs; it alleges the reverse.

unremunerative prices will be as expensive to a diversified monopolist as to a single-product firm. Furthermore, the subsidization theory ignores an important prerequisite of a successful predatory campaign. For unremunerative pricing to make economic sense, the predator must be assured that he will be able to recoup his short term losses in the future. But because a dollar now is worth more than a dollar later (because of both inflation and the time value of money[17]) he must be reasonably certain that once his prey has fallen, he will be able to reap supranormal returns. Thus it is not enough that the predator survive his own predatory prices; he must be able to earn monopoly profits in the not-too-distant future. Such profits, of course, will invite new entry. *See, e.g.*, L. Sullivan, *supra*, at 117; 3 P. Areeda & D. Turner, *supra*, ¶ 618a, at 41-42. Accordingly, in industries in which entry is easy, predatory pricing will not pay. As Northeastern's own experience indicates, the barriers to entry into the business telephone equipment market were relatively low.[18] This does not mean, of course, that Northeastern could not have been a victim of predation. It merely shows that this market was not conducive to a policy of unremunerative pricing. Therefore, we need not adopt a more stringent test of predation merely because SNET is a diversified firm.[19] *Cf.* Joskow & Klevorick, *supra*, at 227-31.

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[17]*See* V. Brudney & M. Chirelstein, Corporate Finance (1972).

[18]As mentioned previously, Northeastern was formed by two Connecticut businessmen in 1972 on a total capital investment of $1,000.

[19]Moreover, the more demanding average cost test of predatory pricing gives rise to serious problems when applied to a diversified enterprise. This is because the accounting conventions used to allocate joint costs, *i.e.*, those costs that are not directly attributable to a particular product, are all arbitrary to a degree. *See* 3 P. Areeda & D. Turner, *supra*, ¶ 719, at 183. Even Northeastern's expert

(Continued on next page)

Northeastern pins its last hopes for an average or fully-distributed[20] cost test on the second distinguishing characteristic of this case — that SNET is subject to the authority of a state regulatory agency. Northeastern contends that even if the market can be relied upon to apportion the joint expenses of an unregulated firm,[21] a regulated utility can allocate all of its joint costs to the monopoly aspects of its business, thereby giving it a permanent advantage over its unregulated competitors.[22] Judge Eginton accepts this argument, reasoning that:

> [t]o permit SNET to allocate all or a disproportionate percentage of its unattributable cost to the noncompeti-

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witness, who testified that appellants should have allocated a portion of their joint expenditures to the cost of their PBXs, did not explain how those costs should be apportioned.

Since businessmen are entitled to notice that their pricing decisions may subject them to antitrust liability, they should be allowed to adopt any reasonable and consistent method for allocating joint expenditures. *See In re IBM Peripheral EDP Devices Antitrust Litigation, supra,* 481 F.Supp. at 998-99. SNET's method, which it termed Long Range Incremental Analysis (LRIA), was to calculate all of the costs directly attributable to a particular product, including such items as operating expenses, capital costs, start-up charges, inflation factors, and "elastic costs" (*i.e.*, the losses in revenue occasioned when a SNET customer switched from using older SNET equipment to a new SNET product). SNET would then estimate the net revenues to be expected from pricing the new product at each of four or more price levels, and select the price that maximized net revenues. In essence, Long Range Incremental Analysis let the market allocate SNET's joint costs. While this method is not beyond challenge — *see* p. 24 *infra*, we believe it was a reasonable procedure for apportioning common expenditures.

[20]Judge Eginton defined fully distributed cost as the "marginal or incremental cost of supplying a particular good or service [plus] some portion of the unattributable costs (*i.e.*, indirect costs.)."

[21]*See* note 19 *supra*.

[22]If an unregulated, diversified monopolist were to try this tactic, its high price on the product bearing all of the firm's joint costs would come under heavy competitive attack. To remain competitive, the monopolist would have to lower that product's price, thereby reallocating common expenditures.

> tive sector of its business . . . is to give defendants an improper pricing advantage over Northeastern and other single market competitors who must allocate all costs directly to their terminal equipment rates. A fully distributed cost standard, on the other hand, would . . . substantially curtai[l] potential subsidization.

This analysis is seriously flawed. First, it proves too much. The advantage Judge Eginton identifies may be enjoyed by all diversified firms, whether regulated or unregulated. But as we have previously discussed, allowing a diversified firm to maintain an artificial pricing floor above marginal cost is impractical and provides a haven for inefficient competitors.

Second, this approach emphasizes the interests of single-market rivals over those of consumers and the competitive process. Marginal cost pricing maximizes short run consumer welfare. *See* 3 P. Areeda & D. Turner, *supra*, ¶ 715a, at 168. Fully distributed cost pricing, in contrast, requires some consumers to pay a higher price for the desired product, and forces others to do without that product entirely, although they are willing to pay the costs of its production. Moreover, a fully distributed cost rule would have perverse consequences when the dominant firm's rival was itself diversified. In that case, presumably, both firms would have to set their prices above their fully distributed costs. So high a price floor might prevent the diversified rival from ever entering the market, thereby curtailing competition rather than promoting it.

Third, Northeastern's argument in favor of the fully distributed cost test is based on a misunderstanding of the economic notion of subsidization. Northeastern seems to believe that whenever a product's price fails to cover fully

distributed costs, the enterprise must subsidize that product's revenues with revenues earned elsewhere. But when the price of an item exceeds the costs directly attributable to its production, that is, when price exceeds marginal or average variable cost, no subsidy is necessary. On the contrary, any surplus can be used to defray the firm's non-allocable expenses.

Finally, Northeastern's fear that SNET will be able to allocate all of its overhead to its monopoly services rests on the premise that the DPUC is either asleep or incompetent. A key step in the long and complex business of rate regulation is the "cost allocation study," in which the regulatory agency distributes fixed costs against the revenues from the regulated and unregulated aspects of the utility's operations. If Northeastern believes that the DPUC is unable to perform these studies, its recourse is to intervene before that body and, if unsuccessful, to appeal to the state courts. If comity and federalism mean anything in this context, they require that we not create an exception to the general rule of marginal cost pricing on the basis of plaintiff's bald assertion that the DPUC cannot perform the duties delegated to it by the state.

To summarize, we are unpersuaded by Northeastern's contentions that fully distributed cost is the relevant standard against which to measure SNET's PBX prices. Such a test would promote economic inefficiency, would be difficult to apply, would elevate the interests of single-market competitors over those of consumers, and would require us to assume that Connecticut is incapable of regulating telecommunications carriers.

Having set forth our extensive exegesis to justify our selection of the marginal cost/average variable cost rule,

we turn at last to an evaluation of Northeastern's evidence of predatory pricing. Our treatment will be brief, since the record contains no evidence that SNET priced its PBXs below marginal cost. Northeastern's expert witness, John Wilson, offered voluminous testimony concerning the various pricing strategies of SNET, AT&T, and Western Electric. He criticized those procedures at length and presented his opinion as to the proper method of pricing the Dimension 100 and the Dimension 400 PBXs. But all of his testimony was predicated on his assumption that SNET's prices were required to exceed fully distributed costs.[23] Northeastern presented no evidence that SNET's PBX prices were below marginal or average variable cost. Accordingly, we must reverse this portion of the judgment. We hasten to add, however, that pricing methods

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[23]Wilson's analysis of SNET's first year "tracking report" does not cure this lack of evidence. During the first year that the Dimension PBXs were on the market, SNET compiled data on the costs and revenues associated with those products. That study, which covered the period from March 1, 1977, to February 28, 1978, showed that while Dimension's revenues were greater than expected, so were its costs, resulting in a $2,000 shortfall where a $25,700 surplus had been forecast. But the existence of this loss does not demonstrate that SNET's tariffs did not exceed its reasonably anticipated average variable costs. Two factors support this conclusion. The first involves the size of the loss itself. Even monopolists cannot be held to a standard of perfection. We have stated that SNET was entitled to price its PBXs at a level equal to its short run average variable costs. A loss of $2,000 on total revenues of more than $232,000 cannot subject SNET to antitrust liability under this standard. Moreover, both the tracking study and SNET's Long Range Incremental Analyses, *see* note 19 *supra*, include certain items of long term expense that are generally excluded from a calculation of short run average variable costs. *See generally* 3 P. Areeda & D. Turner, *supra*, ¶ 715c, at 173. For example, SNET included the rate of return on investment in estimating the costs of its Dimension PBX program. If this component were eliminated, the tracking study would have shown a profit instead of a deficit for the first year of the program's operation.

similar to the one SNET employed may, in other circumstances, run afoul of the antitrust laws. Had Northeastern proved that SNET omitted certain direct costs from its pricing studies, and that with the inclusion of those expenditures, marginal cost would have exceeded price, it would have established a prima facie case of predatory pricing.[24]

b. *The Two-Tier Payment Option*

The traditional monthly fees SNET's customers paid for telephone service reflected both the capital costs of the equipment SNET provided and the operating expenses it incurred. Under this "permanent pay" plan, a customer continued making capital contributions for as long as he used equipment supplied by the utility. Thus, customers of long standing might, over time, pay an amount that exceeded SNET's equipment costs.

The new entrants into the interconnect market did not follow this customary method of revenue collection. Instead, they offered a variety of payment options, from outright purchases to leases of various kinds. To counter the erosion these resourceful offerings caused in its market position, SNET began promoting its own customized payment plan. This option, the so-called two-tier plan, was introduced as an alternative to SNET's conventional billing method. A customer selecting the two-tier

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[24]Of course, SNET would still be entitled to prove that its below-cost prices has an acceptable business justification. *See Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359, n.6 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977). One affirmative defense would be that its prices, while below marginal cost, were loss minimizing. Such prices are inconsistent with the intent to forego short term revenues — a necessary element of the offense of predatory pricing. *See* 3 P. Areeda &. D. Turner, *supra*, ¶ 711b, at 151.

plan would agree to pay for capital equipment costs (Tier A) in equal monthly installments over a fixed period of time. The contractual period could range from one to ten years, depending upon the customer's preferences and the type of equipment involved, but would cease at the end of the contractual period. A plan participant would pay SNET's operating costs (Tier B) for as long as he used the equipment. Unlike the Tier A charge, the Tier B component could be increased with the approval of the DPUC. But, as stated, once the customer had completed the agreed-upon schedule of Tier A payments, he would pay only the Tier B assessment. If he preferred to end this arrangement before the due date, he would be required to pay a termination charge equal to the discounted present value of his remaining Tier A payments. He would also receive a "termination credit" if SNET could use the equipment in providing service to another customer. Depending on the type of equipment and the original Tier A payment schedule, this credit might be greater or lesser than the termination charge.

SNET did not make this option available to all of its business customers simultaneously. On the contrary, it introduced two-tier pricing in different segments of its business as they came under competitive attack. The first items to be offered on the two-tier plan were the larger models of SNET's ComKey key telephone system. Two-tier pricing was later made available to SNET's PBX customers, and finally, to users of a smaller ComKey system, the ComKey 416.

Northeastern contended below, and Judge Eginton agreed, that SNET's implementation of two-tier pricing was anticompetitive. Northeastern's argument was based

on the testimony of John Wilson, its expert economist, who stated that this pricing scheme was an "economic lock-in." In Wilson's view, once a SNET customer began making Tier A payments, he would not switch to a competitor's product, since to do so he would not only incur a termination charge but would also duplicate the capital charges he had already paid to SNET. The consequence of this payment scheme, Wilson concluded, was to remove a SNET customer from the marketplace for the full useful life of the equipment covered by the two-tier plan.

Appellants now seek to refute the claim that two-tier pricing stifled competition, resting their argument on the following language in *Berkey:*

> [M]any anticompetitive actions are possible or effective *only* if taken by a firm that dominates its smaller rivals. . . . Such conduct is illegal when taken by a monopolist because it tends to destroy competition, although in the hands of a smaller market participant it might be considered harmless, or even "honestly industrial."

Berkey Photo, Inc. v. Eastman Kodak Co., supra, 603 F.2d at 274-75 (citations omitted; emphasis supplied). Appellants point out that many of SNET's competitors offered payment plans that were virtually identical to two-tier pricing. For its part, Northeastern vigorously disputes appellants' interpretation of the *Berkey* passage, insisting that it supports the view that this conduct was unlawful. To resolve this issue, therefore, we must explicate the *Berkey* quotation.

Before proceeding, some economic background is in order. As a preliminary matter, we question the conclu-

sion of Northeastern's expert witness that two-tier pricing removes a SNET customer from the market for a significant period of time. This view ignores an important feature of SNET's two-tier plan — the termination credit. Because of this credit, a SNET customer wishing to purchase a competitor's equipment will not lose all of his previous investment in SNET's product. He can, in effect, "resell" his present equipment to SNET[25] and apply that money to the price of the competitor's service offering. That the termination credit may only reduce the termination charge, instead of producing a net refund, does not undermine its financial significance. It is reasonable to suppose that one who has just made his first Tier A payment is unlikely to buy a Northeastern PBX. But the incentives influencing his decision are no different than those operating on one who has just bought any other consumer item, a new car, for example. Northeastern's expert would have us believe that a consumer will not purchase a newer model until after the old one has worn out. Common experience belies this view.

The foregoing analysis demonstrates that the incentives operating on a SNET customer who elects the two-tier plan are similar to those applicable to a new owner of a Northeastern PBX. Just as a SNET customer is unlikely to purchase Northeastern's product, the latter is unlikely to switch to SNET's terminal equipment. Thus, SNET's use of the two-tier plan is no more anticompetitive than Northeastern's practice of selling PBXs. Neither one is an

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[25]Of course, if the customer knows SNET will not give him fair value for the equipment he has been using, he will be less inclined to trade it in. But in the absence of evidence that SNET regularly undervalued its customers' used terminal equipment, we must assume that this practice did not occur.

action that is "possible or effective only if taken by a firm that dominates its smaller rivals." *Berkey, supra*, 603 F.2d at 275. On the contrary, both are "ordinary marketing methods available to all in the market." *Telex Corp. v. International Business Machines Corp.*, 510 F.2d 894, 926 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975). Thus, we conclude that appellants' two-tier payment option was not anticompetitive, and that this portion of the jury's verdict cannot stand.

2. *Advertising*

To avoid prolonging a necessarily extended opinion, we will consider briefly the appellants' remaining challenges to the sufficiency of Northeastern's evidence.

At trial, appellee attempted to prove that SNET's advertising was excessive and disparaged Northeastern's products. Since the disparagement claim did not go to the jury, we need not consider it further. As for the remaining allegation, Northeastern demonstrated that in 1969, shortly after the FCC's *Carterfone* decision, SNET spent only $100 for advertising, but that by 1978, this expenditure had risen to $450,000, an amount representing roughly ½ of 1% of SNET's related revenue for this time period.

Berkey teaches that "[a] monopolist is not forbidden to publicize its product unless the extent of this activity is so unwarranted by competitive exigencies as to constitute an entry barrier." 603 F.2d at 287. Northeastern presented no evidence from which the jury could reasonably infer that SNET's advertising was either unwarranted or that it significantly raised the barriers to entry.[28] Accordingly, this portion of the judgment must also be reversed.

[28]For example, introduction of a new product may violate § 2 if a monopolist acts to compel customer choice by withdrawing a substitute product from the market. *See Berkey, supra*, 603 F.2d at 287 & n. 39.

3. *Product Introduction and Marketing*

We will consider these claims together since they are based on a common fallacy. Northeastern suggests that a monopolist's efforts in meeting competition are to be condemned unless they are intended to promote consumer welfare. While it is a fundamental tenet of antitrust law that customers will benefit from the salubrious effects of competition, a monopolist's right to compete is not limited to actions undertaken with an altruistic purpose. Even monopolists must be allowed to do as well as they can with their business. *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48, 55 (2d Cir. 1979).

In light of these by-now-familiar principles, it is apparent that we must exercise considerable caution in condemning SNET merely for introducing new products, *see Berkey, supra*, 603 F.2d at 286 & n.30, or for reorganizing its marketing operations, *see Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978). While situations may arise in which such actions would violate the Sherman Act,[27] our thorough examination of appellee's evidence indicates that such a case is not presented here. Consequently, these portions of the judgment must be reversed.

4. *SNET's Use of Its Utility Function*

Any business choosing to purchase Northeastern's terminal equipment was still dependent on SNET for local and long distance telephone service. Northeastern asserts that SNET unreasonably impeded competition in the

[27] Although Northeastern also contended that its customers experienced problems concerning the supply and service of the protective couplers, those issues were not submitted to the jury, and we need not consider this evidence.

terminal equipment market by exercising its monopoly power over the provision of these services. In particular, appellee maintains that SNET attempted to discourage businesses from acquiring Northeastern's equipment by intentionally providing poor service to Northeastern's customers. But once again, appellee's proof cannot pass muster even under the generous *Continental Ore* standard. Northeastern did not introduce any evidence whatsoever that SNET provided appreciably poorer service to Northeastern's patrons than it did to businesses using SNET equipment. Similarly, there was not a scintilla of evidence that SNET's failure to provide better service to plaintiff's customers was intentional. Northeastern merely demonstrated that SNET often underestimated the time necessary to cure various electrical malfunctions, including "changeover" problems — *i.e.*, those arising when Northeastern's equipment was connected into SNET's telecommunications system. This evidence was insufficient to sustain a finding that SNET deliberately acted to stifle competition. *Cf. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975). This portion of the jury's verdict also cannot stand.

5. *Protective Couplers*

We arrive at last at the one area in which Northeastern presented some evidence of appellants' anticompetitive conduct. As noted previously, Northeastern does not challenge the lawfulness of the tariffs AT&T filed immediately following the *Carterfone* decision. It does contend, however, that AT&T intentionally designed the protective couplers to impede competition in the terminal equipment market. Specifically, appellee objects that the couplers'

leads were incompatible with its PBXs and that the couplers required an external power source.

In support of its design defect claims, Northeastern relied heavily on the conclusions reached in a National Academy of Sciences study which the FCC had commissioned. Although the NAS panel found AT&T's coupler design to be an "adequate" solution to the problems of interconnection, it also recommended, as we noted above, that the FCC consider a registration system whereby equipment meeting certain minimum standards would be exempt from the coupler requirement. Of particular relevance to Northeastern's allegations, the panel concluded that the couplers' dependence on commercial power was "a significant and probably unnecessary disadvantage." This judgment finds some support in the testimony of James L. Simon, a Bell electrical engineer, who admitted on cross-examination that the coupler could have been designed to operate using the power available in SNET's telephone lines.

Thus, Northeastern's claim that appellants intentionally designed the protective coupler in an unreasonable manner is not totally unsubstantiated. Nevertheless, we cannot uphold the jury's findings of liability. As mentioned previously, the jury's decisions on the four antitrust claims were contained in its answers to fourteen interrogatories. While the district court's third query asked the jury whether each of six activities was anticompetitive, succeeding questions, which were crucial to the jury's verdict, did not differentiate among appellants' allegedly exclusionary practices. For example, Question Four asked the jury if SNET's "anticompetitive or predatory acts . . . were the proximate cause of any injury or

damage to [Northeastern's] business or property." Similarly, Questions Nine and Twelve, which related to the conspiracy claims, referred generally to appellants' allegedly anticompetitive behavior. The jury's affirmative responses to such questions do not tell us which practices formed the basis of its verdict. Had we found that all of appellants' challenged conduct was anticompetitive, the drafting of the interrogatories would not have posed a problem. But Northeastern failed to prove that five of those six activities were exclusionary. Because we cannot be certain that the jury based its verdict exclusively on the one remaining practice, without any spill-over from the practices we have found not to have been anticompetitive,[28] its findings of liability must be set aside, and a new trial ordered.

Moreover, even if we could determine that the jury would have found appellants liable based solely on the design of the protective coupler, a new trial on both liability and damages would still be necessary. In *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), the Supreme Court addressed the propriety of ordering a new trial limited to a redetermination of damages. The Court stated that a partial new trial "may

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[28]Northeastern argues strenuously that it "should be given the full benefit of [its] proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962). Although the logical presentation of our holding has required us to treat each of Northeastern's claims of anticompetitive conduct separately, we have not ignored *Continental Ore's* edict. We have found, however, that in numerous critical respects Northeastern's proof was utterly lacking. Under such circumstances, treating Northeastern's claims collectively cannot have any synergistic effect. *See California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727 (9th Cir. 1979).

not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* at 500. *See also Caskey v. Village of Wayland*, 375 F.2d 1004, 1009-10 (2d Cir. 1967); 6A Moore's Federal Practice ¶ 59.06 (2d ed. 1976).

In the instant case, the proper calculation of Northeastern's lost profits will involve a comparison of the profits Northeastern actually earned with the profits it would have earned had appellants supplied its customers with reasonably designed protective couplers. Thus, the reasonableness of the couplers' design will be a crucial issue at both the liability and damages phases of any further proceedings. Here, as in *Gasoline Products Co.*, "the question of damages . . . is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." *Id.* at 500. To prevent an injustice to the parties, we remand this case for a new trial at which Northeastern may attempt to prove that appellants' design of the protective coupler violated the Sherman Act.[29] Should this endeavor prove successful, the jury may award Northeastern appropriate compensation.[30]

[29]In other circumstances, we might be reluctant to allow a jury to second-guess engineers' decisions as to the proper construction of a sophisticated piece of equipment. But in this case we cannot look to the reaction of the competitive market to determine whether one design is superior to another, *compare Berkey, supra*, 603 F.2d at 287. As noted previously, ATT's post-*Carterfone* tariffs gave it the exclusive right to provide protective couplers. Market forces cannot operate under such circumstances. Thus, we see no alternative to entrusting the matter of coupler design to the judgment of the jury.

[30]To forestall a controversy that will doubtlessly recur should a second damage trial become necessary, we will consider appellants'

(Continued on next page)

IV.

CONCLUSION

Because the issues raised on this appeal are numerous, we briefly summarize our disposition:

(1) Of the six types of conduct Northeastern alleges to have been anticompetitive, we find that it failed to prove five — pricing, advertising, product introduction, marketing, and SNET's use of its utility function.

(2) Although Northeastern presented some evidence that appellants intentionally designed their protective couplers to impede competition in the business terminal equipment market, we must set aside the jury's verdict of liability. Because the interrogatories submitted to the jury did not permit it to differentiate with sufficient precision among the

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contention that Northeastern cannot recover both lost profits and damages to its going concern value. We recognize that these two types of recovery may be awarded in the same case, albeit not for the same time period. *See Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Atlantic City Electrical Co. v. General Electric Co.*, 226 F. Supp. 59, 61 (S.D.N.Y.), *application for an interlocutory appeal denied*, 337 F.2d 844 (2d Cir. 1964) (per curiam). For example, recovery on both grounds will often be appropriate when an antitrust plaintiff can prove that he first lost business and was then driven from the market by the defendant's anticompetitive practices. *See. e.g., Heatransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 987 n.20 (5th Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978). But Northeastern has not shown that its future profitability will be diminished by the design of appellants' protective coupler. Indeed, to do so would be impossible, since the jury's implicit finding that the couplers were unreasonably designed involved the ephemeral and now-invalidated post-*Carterfone* tariffs. Furthermore, we are told that the couplers still in use have been modified to accommodate two-wire interconnection. Under these changed circumstances, Northeastern cannot recover on the theory that it suffered a loss to its value as a going concern. *Cf. Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 393 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

six types of allegedly anticompetitive behavior, we cannot be certain that the jury based its verdict solely on the evidence concerning the couplers' design. Accordingly, a new trial is ordered to enable Northeastern to prove — without resort to evidence of conduct that we have found not to have been anticompetitive — that appellants' design of the protective coupler violated the Sherman Act.

(3) Since we have reversed the judgment of Northeastern in major respects, the award of attorneys' fees is vacated and remanded to the district court for reconsideration in light of our holdings.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 9th day of September, one thousand nine hundred and eighty-one.

No. 80-7740

NORTHEASTERN TELEPHONE COMPANY,
Plaintiff-Appellee,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY,
WESTERN ELECTRIC COMPANY, INC., AND
THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY,
Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellee, Northeastern Telephone Company,

Upon consideration by the panel that heard the appeal, it is ORDERED that said petition for rehearing be DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO, Clerk

By TRAVIS X. GUIDHART,
Chief Deputy Clerk

CRAVATH, SWAINE & MOORE
One Chase Manhattan Plaza
New York, N. Y. 10005
212 Hanover 2-3000

June 1, 1981

United States v. IBM

Dear Mr. Baxter:

I am enclosing a memorandum analyzing the impact of a series of recent Courts of Appeals decisions on the practice issues in this case. I do so in the hope and belief that you will recognize that the announcement of the Second Circuit's opinion in *Northeastern Telephone* last Wednesday closes the ring on the government's practice case here. You will see, I believe as we do, that unless *Berkey* and *Northeastern Telephone* are reversed, it is simply not possible for plaintiff to have any legitimate expectation that it will prevail on at least most of its practice claims.

The decisions discussed — together with the vast changes in the industry since 1969 — compel counsel for both sides to find a way to stop this unprecedented waste of public and private resources now or at least to narrow the issues to what, if anything, you believe is left.

We would appreciate a meeting at your earliest convenience.

Sincerely,

/s/ THOMAS D. BARR

William F. Baxter, Esq.,
Assistant Attorney General,
U.S. Department of Justice,
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IBM OFFERS TO START SETTLEMENT TALKS IN U.S. ANTITRUST SUIT AS SIDES REST CASES

By a WALL STREET JOURNAL *Staff Reporter*

NEW YORK — The 12-year-old antitrust battle between the Justice Department and International Business Machines Corp. reached a new stage yesterday, as both sides rested their cases and IBM offered to begin settlement talks.

IBM told the court it requested a meeting with Assistant Attorney General William Baxter to discuss settling or dropping some issues at trial.

Judge David Edelstein scheduled a conference for June 10, at IBM's request, and invited Mr. Baxter to participate. The judge said that if Mr. Baxter couldn't come to New York, the court would go to him.

In Washington late yesterday, a spokesman for the Justice Department said that Mr. Baxter hadn't finished reviewing the record and wasn't in a position to say whether the Justice Department would agree to begin settlement talks.

The impetus for IBM's attempt to get the Justice Department to enter negotiations apparently springs mainly from a recent decision in an appeal of a case involving Northeastern Telephone Co. and American Telephone & Telegraph Co. That decision reversed a jury verdict on five points involving questions of anticompetitive conduct. The decision favors AT&T and found that some of the company's costing and pricing practices aren't illegal.

IBM's lead counsel, Thomas D. Barr, sent Mr. Baxter a memorandum analyzing the impact of the Northeastern Telephone case as well as an earlier case decided by the same Second Circuit Court of Appeals, Berkey Photo Inc. vs. Eastman Kodak Co.

"You will see," Mr. Barr said in a cover letter accompanying the memo, "that unless Berkey and Northeastern

Telephone are reversed, it is simply not possible for plaintiff (the Justice Department) to have any legitimate expectation that it will prevail on at least most of its practice claims."

The second circuit is the court that would hear any appeal of the U.S. vs. IBM case.

Despite the IBM invitation and the offer of Judge Edelstein to "do everything I can to assist the parties" to reach a settlement, no settlement appears imminent. The judge underscored this point by repeating a schedule for additional submissions, post-trial briefs, responses, post-trial motions and final summations that continues into January 1982.

The Justice Department has yet to say exactly what it wants from the 12-year-old case, other than some sort of divestiture of IBM operations. It accuses IBM of monopolizing what it defines as the markets for "general purpose" computers and peripheral products that are compatible with IBM equipment. Government attorneys argue that among the IBM documents in evidence are many that demonstrate the intent to monopolize — something that must be proved is addition to market dominance.

IBM says it is determined to resist anything like divestiture. It has labeled a Justice Department official's proposal that IBM agree to being split into several companies "an absurdity."

In composite trading on the New York Stock Exchange, IBM closed at $60.25, up $1.50.

THE WALL STREET JOURNAL, Tuesday, June 2, 1981

EXCERPT FROM COURT'S CHARGE

The antitrust laws have a basic purpose which counsel mentioned to you both in their opening statements and in their summations. The basic purpose of the antitrust laws in the United States is to protect, encourage and foster free and unfettered competition as the rule of trade for the American economy. The premise of these laws is that the unrestrained action of competitive forces will yield the best allocation of our economic resources, will bring about low prices, high quality, and the greatest material progress. It's the old idea of Ford competing against General Motors in the marketplace. The laws were enacted to preserve and promote competition, but not to protect particular competitors. That is an important qualification. In the normal course of free and vigorous competition, it is expected that some businesses will suffer losses and some will enjoy success. They will enjoy success because they provide better services, because they introduce better or cheaper products, or they otherwise better and perhaps more quickly meet the needs of the public. This is an accepted and desirable result under our system. The laws do not seek to shield competitors from the risks or effects of vigorous competition. The laws do not seek to penalize successful competitors or to equalize differences between particular competitors, or to shackle the competitive process.

But having said that, on the other hand, the laws are intended to prevent predatory or anticompetitive conduct — and you will hear me mention "anticompetitive conduct" at some length. It is up to you to decide whether a conduct is, in fact, anticompetitive in the context of the evidence of this case, and we will talk some more about that. The laws are intended to prevent that type of conduct which would serve to raise prices, to restrict production, or to interfere with or control the market to the detriment of purchasers and consumers.

The laws are designed to prevent undue concentrations of economic power when such concentrations are achieved

through conduct designed to thwart competition or to exclude competitors from the marketplace. To secure for the public the advantages which accrue from free competition in this country, the law imposes restrictions on the manner in which competitors may acquire and may use economic power, and forbids certain conduct or practices which have the purpose, the tendency or the effect of impeding or destroying competition.

* * *

Now, let's talk about these anticompetitive acts or practices. Anticompetitive acts or practices are acts or practices carried out by a company to maintain monopoly power or to smother competition other than those acts or practices designed to provide superior products or superior services with increased efficiency and ability. Acts or practices, which are otherwise legal, may become anticompetitive if carried out by a monopolist for the purpose of maintaining monopoly power in the relevant market. The defendant SNET claims that its acts and practices were simply efforts on its part to improve its products and services and to compete vigorously but fairly. You are instructed that not all competitive business activity is anticompetitive or predatory. Most activity affects trade in some way. Therefore, in determining whether a business practice is predatory or anticompetitive, or instead is only fair competition, you and you alone must decide whether it unreasonably tends to restrict or otherwise control free and open competition.

In making this determination, you should consider that under our free enterprise system, as I have described it to you, a large company with a large market share can compete and cannot be penalized because it competes successfully through reasonable business practices, superior products or business acumen. You must also keep in mind that occasional isolated unfair or anticompetitive acts may not have an effect on the freeness and openness of competition overall and thus do not violate the antitrust laws. But, as I've told you, you must first find monopoly power

before you may even consider the character of defendants' acts.

Now, it is not an easy task to assess the entire course of conduct of a corporation over a period of many years, and it is not always an easy task to determine whether any particular action is an effort to develop and promote one's own product or an anticompetitive effort to thwart competition. Every time a company makes a sale it is defeating the efforts of some other company to sell to that customer. Success in business by one company may mean that others are not so successful, but that does not mean the first company has acted in an anticompetitive way. The antitrust laws are not intended to penalize companies that accept the challenge of the marketplace, invest their resources, develop new products and market them effectively and thereby become more successful than their competitors. The prospect of that type of success is what spurs companies on under our system to engage in competition and to better meet the needs of their customers, and they are not to be penalized for competing successfully. That is why we have said to you that even if a company has monopoly power and you find that it has monopoly power, it does not violate the antitrust laws if its power stems from reasonable business practices, superior products or its business acumen. But a company with monopoly power may not use that resulting monopoly power to smother the competition and, thus, tighten its hold on the market.

No one expects a successful company's legitimate climb to the top to be accomplished without inflicting a few bumps and bruises on the competitors along the way. Even a company with monopoly power, which must be careful not to misuse that power, does not violate the law just because in an isolated instance it took some steps that would have been aggressive. But the line between innocent growth and wrongful conduct is crossed if you find that a company has injured legitimate competition in its efforts to strengthen its own position. A company is entitled to battle and battle

hard for the consumer's dollar, but the battle must be waged on the merits of its products and its skills against the products and the skills of its competitors.

Now, a course of conduct, as I just said, does not consist of a few random incidents. Rather, it requires repeated and recurring business behavior showing a monopolistic intention.

In addition, in any large organization there may be a small number of any unauthorized acts by subordinates which do not reflect the policy of the companies they work for. If there were such unauthorized acts by employees of the defendant SNET, that would not necessarily mean that SNET has engaged in monopolization.

If you find that there was no willful anticompetitive or predatory conduct other than some minor or isolated instances that in your judgment did not play a significant part in strengthening the defendant's power in the market, then the second element of Section 2 of Sherman has not been established. A few isolated instances of anticompetitive behavior, although not to be praised or condoned, simply are not what the antitrust laws were designed to prevent. Thus, to satisfy Section 2, the plaintiff must prove to you that defendant SNET engaged in anticompetitive or predatory conduct to the extent that it significantly affected the market position of the various companies in this business.

You have heard testimony, again, as I have said before, about the activities of the PUCA and the Federal Communications Commission and the proceedings conducted by them relating to a number of the activities of the defendant which the plaintiff complains about. In reviewing defendant's conduct, you may consider that SNET is not the normal industrial company, but is a public utility subject to regulation by those bodies. And again, I've told you how much weight you should or should not give to what those bodies did or did not do.

Finally, in determining whether defendant's conduct is reasonable or whether it is anticompetitive or predatory, you may consider whether interconnect companies engage in similar practices. Thus, if you conclude that the defendant's practices were essentially the same as those of its competitors, that is, SNET's practices were the same as those of its competitors, such as Northeastern, that is evidence that these practices are merely ordinary marketing efforts and, therefore, reasonable. However, you must keep in mind that if a company has monopoly power, it may not wield that power to prevent or to impede competition.

Now, in this case you have heard extensive testimony about certain acts by SNET which the plaintiff claims were unlawful acts of monopolization. You remember those included the improvement of marketing operations, the introduction of new products, advertising, the introduction of new pricing practices, including the customized payment plan and the alleged pre-announcement of new service offerings. None of these acts, by itself, is unlawful, but when those actions are not done for reasonable business purposes, but are done with the intent of impeding competition, then they become unlawful. Therefore, in considering all of the evidence of the acts in this case, you must ask yourself whether SNET was engaging in normal and reasonable conduct in competition with the plaintiff and others, or whether it was attempting to impede competition.

Now, we are going to break right now for twenty minutes, and then when we come back I will be getting into each of those six areas with you and reviewing the evidence on it and the law applicable to it with you.

So we will break until ten after eleven.

(Court recessed at 10:55 A.M. and reconvened at 11:10 A.M.)

THE COURT: All right. Ladies and gentlemen, we are now ready to discuss the various acts and practices of the defendant SNET which the plaintiff claims were anticom-

petitive, and these will be discussed by the various categories of them, and I want to warn you, as I will be commenting later on and when we get to the actual interrogatories, each one of these elements is independent of the others. You are not to consider that just because you find, for example, no answer on one of these, that that carries over into the other areas, or a "yes" answer on one of them carries over into the other areas. Consider each one individually, make your decision on each one as to whether it has been established or not as an anticompetitive practice, and consider them entirely separate, one from the other, and make your answers independent.

All right. We will start with pricing. In the area of pricing, the plaintiff NET first claims that SNET's rates for business terminal equipment have been too low and that such rates are below SNET's cost. SNET, on the other hand, claims that its prices cover its costs and are therefore justified and fair rather than anticompetitive.

Plaintiff also contends that the two-tier or the customized payment plan was intentionally adopted as an anticompetitive practice to impede competition. In this regard the plaintiff claims that the plan was designed by the defendant SNET and AT&T as an anticompetitive device to foreclose substantial portions of the market from competition, and the use of the two-tier accomplished that end. SNET claims that its two-tier or customized payment plan merely offers its customers an alternate way to pay for service which the customers select or reject. SNET further claims that the plan was adopted to give its customers what they requested and not for any anticompetitive purpose.

Now, with regard to plaintiff's contentions regarding the level of pricing, you are instructed that you may find that SNET's level of pricing can constitute an anticompetitive act only if you find from the evidence that SNET priced its equipment below its costs. That is the essential element. If you find that SNET did not price below its costs, then the level of pricing is not an anticompetitive act.

As for the plaintiff's contentions regarding the two-tier or customized payment plan, you can find that this constituted an anticompetitive act only if you find from the evidence in your judgment that SNET adopted the plan primarily to impede competition as opposed to merely wanting to serve the customer's needs. That is that dividing line I talked about before. And that covers pricing.

Next we get to that protective coupler you heard so much about. That was the black box on one of those charts over there.

The next set of acts which plaintiff claims are anticompetitive acts involve the protective coupler. There is no attack by the plaintiff on the fact that the tariffs in effect until June 1978 required that all non-Bell equipment be attached to the network through protective couplers to be furnished by the Bell System. The plaintiff NET is not attacking that requirement as such.

The plaintiff does claim that the couplers designed and furnished by the Bell System were overdesigned, making them more expensive than necessary, designed in a way to require modification of non-Bell equipment or to require additional equipment and designed to require an external power source on the customers' premises.

The defendant SNET claims that the design of the couplers was reasonable and was intended to carry out the purpose for which the couplers were required.

In addition, the plaintiff claims that Southern New England Telephone committed anticompetitive acts by using the effect of the coupler in its sales efforts against competition.

The defendants claim that the coupler was not used in its sales efforts.

Here again, you must consider the purpose behind the acts. If the design of the couplers was reasonable for the purpose of protecting against network harms, then the

design was lawful. If you find from the evidence that the couplers were not reasonably designed, but were designed with the purpose of impeding competition, only then can you find that the design of the coupler was anticompetitive or predatory.

All right. The third element is advertising. The plaintiff NET claims that the defendant SNET carried out massive advertising campaigns in an effort to impede and eliminate competition. The defendant SNET claims that its advertising programs were fair and reasonable.

You are first instructed that ordinarily advertising is not illegal, and it can be engaged in by big companies and small businessmen alike. However, if you find from the evidence that the defendant SNET intentionally entered into massive advertising programs designed to create an entry barrier into the relevant market to new competitors and to impede competition, then you may find such advertising programs to be an anticompetitive act.

If you find that the defendant's advertising program was designed to inform potential customers of the services it offered and to strengthen its competitive position, you may not find that it was anticompetitive.

Now, there again is that line which is for you to decide.

The next area is marketing. The plaintiff claims that the defendant SNET had marketing policies that were designed and carried out in an anticompetitive or predatory manner. The plaintiff claims that SNET disparaged competitors' services and equipment and competed for sales in a predatory or anticompetitive manner.

The defendant SNET, on the other hand, claims that its marketing efforts were fair and reasonable, and it is up to you to decide from the evidence whether in fact, SNET's marketing policies and practices were fair and reasonable, or whether they were anticompetitive. You can see that theme runs throughout each of these.

The fifth element is the use of the utility function. The plaintiff claims that the defendant SNET used the fact that it had a monopoly in the furnishing of basic telephone exchange service as an anticompetitive act.

You remember that SNET said — in fact, the parties agree that these customers of NET continued to be SNET's customers also.

Now, the plaintiff claims that SNET accomplished this in two ways. First, the plaintiff claims that SNET discriminated in the services furnished to customers of competitors both in pricing and the quality of service. Second, that SNET made use of employees and services in the utility aspects of its company in its efforts to impede the sales efforts of competitors.

SNET denies these claims and asserts that customers of competitors received the same services and pricing of services that all customers received, and they did not use their utility employees or services to impede competition.

If you find from the evidence that these acts occurred as claimed by the plaintiff, and further, that the acts occurred as the result of an intent by the defendant SNET to impede competition, then you may find that this constituted an anticompetitive act. Otherwise, you cannot find that these acts were anticompetitive.

Again, that judgment decision on the facts is up to you.

Finally, the sixth area is the area of the introduction of new products. The plaintiff claims that some of the defendant's actions with regard to the introduction of new products were anticompetitive. For example, they talked about Comkey and Dimension. SNET contends that the introduction of such new products was based upon normal business considerations.

You are instructed that the introduction of new products designed to better serve the customer needs by any business, including one with a large market share, is not unlawful.

Indeed, companies are encouraged by the antitrust laws to compete aggressively on the merits through invention and innovation. However, if you find from the evidence that the intent of SNET in introducing the new products known as Comkey and Dimension were solely for the purpose of maintaining its market share and to impede competition, you may find that this introduction constituted an anticompetitive act.

Further on that claim, the plaintiff contends that the defendant SNET publicly announced and marketed its new products before tariffs had been filed allowing them to offer the new products. Defendant SNET contends they did not pre-announce.

If you find from the evidence that SNET announced and began to market new products before tariffs for the products had been filed, and if you further find that such pre-announcement and marketing was done with the intent of preventing competitors from making sales until after SNET's products had become available, you may find that such acts constituted anticompetitive conduct. Otherwise, you may not so find. So you find that common thread running through each one of these elements. But as I emphasized before, I will again, each is to be considered by you separately, as a separate deliberation for you.

So I have now completed my instructions to you on those acts or practices of SNET that the plaintiff complains about. With respect to each one of them, you must find whether all or any one or more of them were anticompetitive or predatory, or whether they were reasonable competitive practices.

Under the law SNET is free to engage in reasonable competitive activity, and that activity need not be pursued in a half-hearted manner.

That completes my instructions to you on the monopolization claim, the monopolization of the relevant market. Remember that for the plaintiff to succeed on the charge of monopolization, it must convince you of two things by a

preponderance of the evidence. First, you must find that SNET possessed monopoly power in the relevant market; and second, you must find that the defendant SNET maintained this monopoly power by exclusionary, anticompetitive or predatory means, or used this power for exclusionary or anticompetitive purposes as opposed to maintaining its monopoly power solely as a result of reasonable business practices, superior products or business acumen, and that decision is up to you.

Now, I said that there's another charge against SNET only, and that is the charge of attempted monopolization, which is likewise under Section 2 of Sherman. This is the market for PBX's and key telephone systems in Connecticut, and the plaintiff charges that the defendant SNET attempted to monopolize this market. As I have said to you before, and I want to make clear again, this attempt to monopolize is an entirely separate offense from actual monopolization under our laws, and we have given you separate interrogatories for you to answer.

Section 2 makes it unlawful to monopolize or to attempt to monopolize, and the elements differ in some important respects. It is, therefore, possible to commit either offense without the other. You can monopolize without attempting to monopolize, and you can attempt to monopolize without being successful. And it is possible to commit both of these offenses in the same manner, or to commit neither one, or to commit one without the other.

All right. What are the other elements? I have already given you the elements on monopolization. So let's review the elements that you must find that the plaintiff has proven to your satisfaction if it is to sustain its charge of attempted monopolization. And you must find all three elements before you can find the defendant SNET liable for attempted monopolization.

First, you must find that the defendant SNET specifically intended to achieve monopoly power in the market for

PBX's and key telephone systems. If you find that, then secondly, you must find that the defendant SNET sought to achieve that power by acts that were anticompetitive or predatory. You go back to those six acts that we have been over. Third, that there was a dangerous probability that the defendant SNET would succeed in its efforts to achieve monopoly power in the market.

And before you start asking me what "dangerous probability" is, I will tell you I am going back over all of these elements. So let's take them one by one.

The first element is that you must find that SNET specifically intended to achieve monopoly power in the market for PBX's and key telephone systems.

What is that element of specific intent? All right. To prove that, plaintiff must convince you by a preponderance of the evidence that the defendant SNET had that specific intent to achieve monopoly power in the market for PBX's and key telephone systems. Now, you have already learned the meaning of the term "monopoly power" from our suggestion of monopolization. Remember, that is the power to control prices or to exclude competition.

Now, there are two types of evidence that can establish that defendant SNET specifically intended to achieve monopoly power in a given market. First, would be the defendant SNET's actual conduct as you review it. That may serve as evidence of a particular intent. It may serve as evidence of a lack of such specific intent. That is what is up to you.

If you find that defendant's conduct was not reasonable, competitive conduct, but simply had the objective of obtaining monopoly power, you may consider this as evidence that defendant specifically intended to obtain monopoly power in a particular market. However, this conduct must predominantly be exclusionary, rather than primarily be a form of competition based on either appeal to customers or attempts to meet customer needs, in order for you to find

that defendant specifically intended to obtain monopoly power.

There again, you have that same guiding line, and that is up to your determination.

Obviously, as we have said before, a corporation is not a person, and that is something you have to consider when you are trying to consider what specific intent is. When you consider a corporation's specific intent, you are not focusing on the statements or the thoughts or the intentions of any one person. You are entitled to consider whether a corporation had a prohibited specific intent by focusing on the statements, thinking and intentions of its senior personnel during these relevant time periods. You heard those senior personnel on the witness stand several times during the course of this case, and you can judge them on that basis. The statements or thoughts of just one official on one occasion might not establish the intent of the corporation, but you can find that a corporation had a specific intent to achieve monopoly power if you find that its senior personnel had such intentions and determined to direct the corporation toward the achievement of monopoly power.

Now, remember that I said Element Two of this attempt to monopolize has to do with the anticompetitive or predatory conduct. And again, that is relatively simple for you because you are dealing with the same element here that you were dealing with on monopolization; and on that, you must find, if you are going to find, that the defendant pursued the objective of monopoly power in the relevant market by means of anticompetitive or predatory conduct. And I have already told you what that meant.

I reviewed for you the six categories of acts by the defendant SNET which the plaintiff claims to be unlawful acts of monopolization. Now, those same acts the plaintiff NET contends establish SNET's intent and attempt to monopolize the market for PBX's and key telephone systems. So when you examine that evidence that I asked you to exam-

ine on the monopolization point, you must also examine it for the purpose of reviewing the plaintiff NET's claim that the defendant SNET attempted to monopolize the market.

You must decide whether the plaintiff has proved the second essential element of attempted monopolization — exclusionary or anticompetitive efforts to obtain monopoly power in that market as distinct from those reasonable competitive efforts.

The same line has to be drawn again.

THE JURY VERDICT

THE CLERK: Ladies and gentlemen of the jury, please listen to your verdict as received by the Court.

In Civil Action B 75 319, Northeastern Telephone Company versus American Telephone & Telegraph Company et al, Item 1, the charge of monopolization. (A) Monopoly Power in the Relevant Market. Question 1. Do you find from a preponderance of the evidence that the defendant Southern New England Telephone Company possesses the power to control the prices of products in the relevant market?

Answer: Yes.

2. Do you find from a preponderance of the evidence that the defendant Southern New England Telephone Company possesses the power to exclude competition from the relevant market?

Answer: Yes.

(B) Anticompetitive or Predatory Conduct. Question 3. Do you find from a preponderance of the evidence that the defendant Southern New England Telephone Company maintained monopoly power by exclusionary anticompetitive or predatory means as opposed to reasonable business practices, superior products or business acumen or used monopoly power for exclusionary or anticompetitive purposes by any of the following practices:

(A) Pricing. Yes.

(B) Protective coupler. Yes.

(C) Advertising practices. Yes.

(D) Marketing. Yes.

(E) Use of utility function. Yes.

(F) New products. Yes.

If and only if you have answered "Yes" to one or more of the subparts of Question 3, then answer Question 4.

Question 4. Do you find from a preponderance of the evidence that the anticompetitive or predatory acts or practices of defendant Southern New England Telephone Company were the proximate cause of any injury or damages to plaintiff's business or property?

Answer: Yes.

Section 2. The charge of attempted monopolization. (A) Specific intent. Question 5: Do you find from a preponderance of the evidence that the defendant Southern New England Telephone Company specifically intended to acquire monopoly power in the relevant market?

Answer: Yes.

(B) Dangerous probability of success. Question 6. Do you find from a preponderance of the evidence that there was a dangerous probability that defendant Southern New England Telephone Company would succeed in its efforts to monopolize the relevant market?

Answer: Yes.

Section 3. The charge of combination or conspiracy to monopolize. (A) Combination or conspiracy. Question 7. Do you find from a preponderance of the evidence that any two or more of the defendants engaged in a combination or conspiracy to acquire or maintain monopoly power in the relevant market?

American Telephone & Telegraph Company. Yes.

Western Electric Company. Yes.

Southern New England Telephone Company. Yes.

(B) Specific intent to monopolize. Question 8. Do you find from a preponderance of the evidence that any two or more of the defendants joined the combination or conspiracy with a specific intent to acquire or maintain monopoly power in the relevant market?

American Telephone & Telegraph Company. Answer: Yes.

Western Electric Company. Answer: Yes.

Southern New England Telephone Company. Answer: Yes.

If and only if you have answered "Yes" to any two or more companies both in Questions 7 and 8, then answer Question 9.

(C) Acts in furtherance of the conspiracy. Question 9. Do you find from a preponderance of the evidence that any of the defendants engaged in any of the activities listed in Question 3 which you find to be anticompetitive or predatory and in furtherance of the combination or conspiracy? Answer: Yes.

If and only if you have answered "Yes" to Question 9, then answer Question 10. Question 10: Do you find from a preponderance of the evidence that the combination or conspiracy to monopolize was the proximate cause of any injury or damages to plaintiff's business or property? Answer: Yes.

Section 4. The charge of combination in restraint of trade. Question 11. Do you find from a preponderance of the evidence that any two or more of the defendants entered

into a contract, combination or conspiracy in restraint of trade?

American Telephone & Telegraph Company. Answer: Yes.

Western Electric Company. Answer: Yes.

Southern New England Telephone Company. Answer: Yes.

If and only if you have answered "Yes" as to any two or more companies in Question 11, then answer Question 12. Question 12. Do you find from a preponderance of the evidence that any of the defendants engaged in any of the activities listed in Question 3 which you find to be anti-competitive or predatory and pursuant to such contract, combination or conspiracy? Answer: Yes.

If and only if you have answered "Yes" to Question 12, then answer Question 13. Question 13. Did such activity constitute an unreasonable restraint of trade? Answer. Yes.

If and only if you have answered "Yes" to Question 13, then answer Question 14. Question 14. Do you find from a preponderance of the evidence that the contract, combination or conspiracy in restraint of trade was the proximate cause of any injury or damages to plaintiff's business or property? Answer: Yes.

Ladies and gentlemen of the jury, is this your verdict, and so say you all?

(The jury responded affirmatively.)

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JUDGMENT ON JURY VERDICT
In The
UNITED STATES DISTRICT COURT
For The
DISTRICT OF CONNECTICUT

Civil Action No. B-75-319

NORTHEASTERN TELEPHONE COMPANY,

vs.

AMERICAN TELEPHONE & TELEGRAPH COMPANY;
WESTERN ELECTRIC COMPANY, INC.; AND
THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY,

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Warren W. Eginton, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff recover of the defendants damages in the amount of $5,515,692.00,

It is further Ordered and Adjudged that pursuant to Title 15 U.S.C. § 15, the damages are trebled for a total of $16,547,076.00.

Dated at Bridgeport, Connecticut, this 11th day of January , 1980.

SYLVESTER A. MARKOWSKI
Clerk of Court

By .....
Deputy in Charge

Opposition

Office - Supreme Court, U.S.
FILED
JAN 11 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1079

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

NORTHEASTERN TELEPHONE COMPANY,

Petitioner,

—against—

AMERICAN TELEPHONE & TELEGRAPH COMPANY, WESTERN ELECTRIC COMPANY, INC., and THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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January 8, 1982

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Petitioner Northeastern Telephone Company seeks review of the court of appeals' rejection of five of its six charges that the conduct of respondents, three Bell System companies, violated the antitrust laws.* At trial, Northeastern attacked virtually

* Pursuant to Rule 28.1 of the Rules of this Court, respondents set forth below the names of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of the respondents:

Cincinnati Bell Inc.
Cuban American Telephone and Telegraph Company
Gold Star Semiconductor Limited
The Pacific Telephone and Telegraph Company.

every significant competitive act engaged in by respondents in the relevant market over a seven-year period, including pricing, marketing, advertising and introducing new products. Having had one appellate court reject its claims as insufficient as a matter of law, Northeastern now in effect asks this Court for a second appellate review of the evidence.

The court of appeals agreed with respondents that the antitrust laws do not prohibit ordinary competition, even by an established monopoly, or provide the special protection Northeastern seeks for itself from the rigors of a competitive marketplace. Recognizing this as the rule required by this Court, the court of appeals went on to consider each of the practices challenged by Northeastern. It determined that five of Northeastern's six claims had to fail because there was no evidence that the challenged conduct was anticompetitive or exclusionary. The court also rejected Northeastern's suggestion that a different rule be applied because respondents' monopoly allegedly had been "illegally obtained." This suggestion was rejected because Northeastern had not tried to prove the alleged illegality in the district court. Appendix to petition ("App.") C-16.

Northeastern's petition misrepresents the holding of the court of appeals and previous decisions of this Court in an effort to create a conflict between them. The statement by the court of appeals of the elements of the offense of monopolization follows this Court's decisions in a line of cases decided since 1911. Contrary to Northeastern's suggestion, the court of appeals decision in no way departs from the teachings of this Court or from the way those teachings have been applied by other circuits.

Northeastern also asserts that the court of appeals' test for predatory pricing is inconsistent with decisions of this Court and other courts of appeals. The decisions of this Court upon which Northeastern relies do not address the question that was before the court below, and the two court of appeals opinions to which Northeastern refers do not disagree with the opinion

below. More important, Northeastern fails to note that the Second Circuit's test for predatory pricing is the same as the standard adopted by each of the seven other circuit courts that has considered the question.

Northeastern claims that this case has "unusual importance" because it "presents an opportunity for the Supreme Court to set forth a nationwide authoritative antitrust guide" to the communications industry. Petition ("Pet.") 12. This Court, however, already provides the guide Northeastern requests in the form of decades of opinions interpreting the Sherman Act. What Northeastern really seeks is not to have the Court issue a guide to the antitrust laws, but rather to rewrite prior decisions in this area. Furthermore, this case does not become important because other competitors have asserted antitrust claims against various Bell System companies, as Northeastern argues. The courts in those other cases presumably will read and apply this Court's decisions as faithfully as the court of appeals did here.

Finally, Northeastern asserts that it was denied its right to a jury trial by the court of appeals' "blithely setting aside [the] jury verdicts." Pet. 15. The court of appeals, however, did not substitute its view of the evidence for the jury's findings, but rather gave Northeastern the benefit of all the evidence, drawing all reasonable inferences in Northeastern's favor. In deciding that Northeastern's proof could not pass muster even under this standard, the court of appeals performed its proper role.

ARGUMENT

I.

THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARD FOR MONOPOLIZATION.

In an attempt to reverse the court of appeals decision, Northeastern repeatedly misstates the legal standard applied by that court. According to Northeastern, that court "condones monopoly power unless it is shown to have been maintained through acts which are illegal in and of themselves." Pet. 8.* The court of appeals, however, did not require Northeastern to prove that respondents' acts were "illegal in and of themselves." What the court of appeals held was that Northeastern was required to show that respondents' "business practices were an exercise of its power over the market" (App. C-16), that respondents "engaged in anticompetitive behavior" (App. C-17) or that their "business practices are . . . exclusionary" (App. C-18). Thus, the court of appeals did not hold what Northeastern says it held, and its holding does not conflict with the decisions of this Court.

The requirement that a plaintiff seeking damages for a violation of section 2 of the Sherman Act must prove that the defendant's behavior was anticompetitive or exclusionary has been the unbroken rule for decades, and it is not in need of another reaffirmation. The offense of monopolization means more than simply being big or possessing monopoly power—"the law does not make mere size an offence" (*United States v. U.S. Steel Co.*, 251 U.S. 417, 451 (1920); *accord*, *United States v. International Harvester Co.*, 274 U.S. 693, 708 (1927)), and there is no "direct prohibition against monopoly in the con-

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* Similarly, Northeastern claims that "the opinion below asserts that the willful acquisition and maintenance of monopoly power is unlawful only when coupled with certain illegal acts which the Court does not define." Pet. 7.

crete" (*Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911)). Merely because a company has a monopoly, it does not follow that it unlawfully monopolized. *American Tobacco Co. v. United States*, 328 U.S. 781, 813 (1946).

In addition to showing monopoly power, Northeastern was required to prove the "willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident," accomplished by "exclusionary practices." *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71, 576 (1966). Such "exclusionary practices" are those which by predation, coercion or restriction deny others "access to the market" (*United States v. Griffith*, 334 U.S. 100, 108 (1948)) and "exclude them from their right to trade" (*Standard Oil*, 221 U.S. at 76). The court of appeals recognized that Northeastern was required to prove that respondents' conduct was anticompetitive or exclusionary, and there is no conflict between the court below and this Court on this point.

Nor did the court of appeals in this case differ from other appellate courts in the way it applied this Court's teachings. As the court below noted, its decision merely elucidated and applied the rationale of *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 281 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). App. C-3. These same standards also have been applied recently by courts of appeals in *California Computer Products, Inc. v. IBM Corp.*, 613 F.2d 727, 742, 744 (9th Cir. 1979); *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48, 55 (2d Cir. 1979); *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 711 (7th Cir. 1977), *cert. denied*, 439 U.S. 822 (1978); *Telex Corp. v. IBM Corp.*, 510 F.2d 894, 927 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975); and *Travelers Insurance Co. v. Blue Cross*, 481 F.2d 80, 84 (3d Cir.), *cert. denied*, 414 U.S. 1093 (1973).

The court of appeals examined the evidence relating to respondents' pricing, marketing, advertising and product introduction to determine in each case whether it could support

the charge that the challenged conduct constituted "the use of monopoly power . . . to foreclose competition, to gain a competitive advantage, or to destroy a competitor . . . ." *Griffith*, 334 U.S. at 107. In each case, the court found that there was no evidence that respondents' conduct was an impermissible misuse of monopoly power, but rather that it was the sort of competitive conduct that the antitrust laws encourage.

Finally, Northeastern asserts that respondents' monopoly power was illegally obtained (Pet. 6, 14), apparently believing that this assertion is relevant to whether the Court should exercise its discretion to accept review. Northeastern also tried to rely on this claim in the court of appeals, but as that court correctly noted, Northeastern "did not undertake to prove this contention to the jury." App. C-16. Northeastern has waived any argument on this point, which has no merit in any event.

II.

THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARD FOR PREDATORY PRICING.

Northeastern argues that the adoption by the court of appeals of a marginal cost standard for predatory pricing creates "specific" and "clear" conflict with the decisions of this Court and of other circuit courts. Pet. 8, 9. Northeastern sees conflict where there is uniformity. Each of the eight circuit courts to pass on the question of an appropriate standard has adopted the marginal cost standard. *Super Turf, Inc. v. Monsanto Co.*, 1981-2 Trade Cases (CCH) ¶ 64,316 (8th Cir. 1981); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340 (3d Cir. 1981); *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427 (7th Cir. 1980); *California Computer Products, Inc. v. IBM Corp.*, 613 F.2d 727 (9th Cir. 1979); *Americana Industries, Inc. v. Wometco de Puerto Rico, Inc.*, 556 F.2d 625 (1st Cir. 1977); *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); *International Air Industries, Inc. v. American*

Excelsior Co., 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976). None has accepted the fully distributed cost standard urged by Northeastern.

The marginal cost standard "is consistent with the pro-competitive thrust of the Sherman Act" (App. C-21) and springs from the fundamental antitrust policy of encouraging "robust competition." *Berkey Photo*, 603 F.2d at 272. "Establishing a pricing floor above marginal cost would . . . provide a price 'umbrella' under which less efficient firms could hide from the stresses and storms of competition." App. C-22. The provision of an umbrella—or as Northeastern puts it, "short term protection" (Pet. 13; see also Pet. 8)—is inconsistent with the policy of protecting competition, not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962); *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256, 1259 (9th Cir. 1981); *Chillicothe*, 615 F.2d at 431. This is no less true where the defendant is regulated or where it is a multi-product firm. See App. C-24 to C-28.

Lifting a line out of its context in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), Northeastern claims that the decision below conflicts with the Court's decision in that case. There is no conflict. *Utah Pie* was a Robinson-Patman Act case involving geographic price discrimination. The Court did not decide in that case what prices are predatory under the Sherman Act, the issue before the court of appeals here. In the language quoted by Northeastern—that a particular price "was less than . . . direct cost plus an allocation for overhead" (*id.* at 698)—the Court was not stating a test for predatory pricing or even one for discriminatory pricing in Robinson-Patman cases; it was merely describing one of the challenged prices. There is, therefore, no conflict between the court of appeals decision and *Utah Pie*.

The Court's holding in *American Commercial Lines, Inc. v. Louisville & Nashville R.R.*, 392 U.S. 571 (1968), the second case relied on by Northeastern, is even further afield. The

"central issue" in that case was the meaning of the words "inherent advantage" in the National Transportation Policy, incorporated by reference into section 15a(3) of the Interstate Commerce Act. *Id.* at 575 n.2. Like *Utah Pie*, that case had nothing whatever to do with predatory pricing under the Sherman Act. The Court held that the ICC had the discretion under its broad statutory authority to look to fully allocated costs in determining what "inherent advantage" one mode of transportation enjoyed over another. *Id.* at 583-84. Thus, Northeastern's statement that "the Supreme Court has accepted the full cost approach to predatory pricing in the case of *American Commercial Lines, Inc. v. Louisville & Nashville R.R.*" (Pet. 9) is a flat misstatement of this Court's decision.

For similar reasons, there is no conflict with *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221 (D.C. Cir. 1980), *cert. denied*, 101 S. Ct. 1998 (1981). In that case, the District of Columbia Circuit ruled that it was not arbitrary and capricious for the FCC to use fully distributed costs for regulatory purposes under the Communications Act. Moreover, that court, in another regulatory appeal involving telephone company rates, recognized "the general prevalence of the incremental or marginal cost idea in the law of predatory pricing" and found the fully distributed cost standard to "be more restrictive than those common in antitrust cases." *American Tel. & Tel. Co. v. FCC*, 602 F.2d 401, 410 n.49 (D.C. Cir. 1979).

Northeastern also imagines a conflict between the opinion below and the Ninth Circuit's opinion in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 652 F.2d 917 (9th Cir. 1981). Northeastern's own quotations from the two opinions, however, highlight their consistency. While the language used is different—one circuit speaks in terms of burdens of proof and the other in terms of presumptions—both courts say the same thing. The Ninth Circuit test quoted by Northeastern is: "[I]f the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden

of showing defendant's pricing was predatory." Pet. 10, quoting 652 F.2d at 940. The Second Circuit test quoted by Northeastern is: "[P]rices above reasonably anticipated marginal costs will be presumed non-predatory . . . . And because marginal costs cannot be determined from conventional accounting methods, we will use average variable cost as its surrogate." Pet. 9, quoting App. C-23 to C-24. The *Inglis* opinion does not adopt the fully distributed or average total cost standard advocated by Northeastern, and both the Ninth Circuit and the Second Circuit look to marginal or average variable costs. Significantly, the Ninth Circuit in *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981), adhered to the marginal cost test, even though that decision was amended after the *Inglis* opinion, and *Murphy Tugboat* confirms that there is no conflict between the Ninth and Second Circuits.

Even Northeastern does not argue that this case would have been decided any differently by the Ninth Circuit. As the court below noted, Northeastern's predatory pricing case was "predicated on [the] assumption that SNET's prices were required to exceed fully distributed costs" (App. C-29), and its proof at trial did not even contain a direct comparison of these costs and the relevant prices. Thus, the Ninth Circuit would have found Northeastern's proof insufficient, just as the Second Circuit did.

III.

THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARD IN REVIEWING THE EVIDENCE.

Northeastern claims that the court of appeals substituted its view of the evidence for the jury's findings and thereby "summarily eradicated" the "conscientious determinations" of the jury. Pet. 16. To the contrary, the court below applied the correct standard of review, stating:

> "[W]e must 'view the evidence in the light most favorable to [Northeastern] and . . . give it the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn.' *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962)." App. C-14. See also App. C-15, C-18, C-36.

Viewing the evidence in this light, the court was "unable to conclude that the jury had a rational basis for its verdict" (App. C-15) because Northeastern's proof of anticompetitive conduct was "utterly lacking" in five of the six areas* (App. C-38 n.28). The court did not substitute one view of the facts for another. The relevant facts were undisputed: SNET priced at certain levels and offered its subscribers certain payment options; it engaged in a given level of advertising; it introduced certain new products at certain times. The court of appeals did not reappraise these facts. Rather, it decided that the antitrust laws do not prohibit but, indeed, encourage the uncontroverted conduct. Thus, the decision of the court of appeals turned on the legal significance of respondents' conduct, not on questions of intent, credibility or demeanor as Northeastern argues.

Northeastern claims that its right to a jury trial was effectively denied; however, the Seventh Amendment does not require that courts of appeals affirm judgments merely because citizens were "subjected to the expense and inconvenience of protracted jury service." Pet. 16. "As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment *n.o.v.* than when a trial court does; consequently, there is no constitutional bar to an appellate

---

* After reviewing the evidence on Northeastern's sixth claim—that the protective coupler was designed in an anticompetitive manner—the court of appeals found it "not totally unsubstantiated" and remanded it for a new trial. App. C-37.

court granting judgment *n.o.v.*" *Neely v. Martin K. Eby Construction Co.*, 386 U.S. 317, 322 (1967). Where the jury reached a result not based on the evidence—where, as here, "proof was utterly lacking" (App. C-38 n.28)—it is the duty of the court to reverse. *Pence v. United States*, 316 U.S. 332, 340 (1942); *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1042 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976). Thus, the court of appeals did not deny Northeastern its right to a jury trial.

Conclusion

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 8, 1982

CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States, hereby certifies that on this 8th day of January, 1982, pursuant to Rule 28.3 of the Rules of this Court, three copies of the Brief in Opposition were mailed, first-class postage prepaid, to J. Robert Sheehy, Sheehy, Lovelace & Mayfield, P.C., 1200 American-Amicable Building, Waco, Texas 76701. I further certify that all parties required to be served have been served.

/s/ HARVEY KURZWEIL
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Petitioner's Reply Brief

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NO. 81-1079

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

NORTHEASTERN TELEPHONE COMPANY,
Petitioner,

v.

AMERICAN TELEPHONE & TELEGRAPH COMPANY;
WESTERN ELECTRIC COMPANY, INC. AND
THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY,
Respondents.

REPLY BRIEF

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January 15, 1982

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Respondents.

REPLY BRIEF

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

At the trial of this case, the illegality of respondents' monopoly power was established as a matter of law.

ARGUMENT

The respondents attempt to conceal a significant error in the court of appeals from this Court's scrutiny by asserting that petitioner waived its right to argue that respondents' monopoly power was illegally obtained. (Brief in Opposition, Page 6). The court of appeals erroneously concluded that the petitioner did not undertake to prove to the jury that the respondents' monopoly power was illegally obtained. (Appendix to Petition, C-16). Nothing could be further from the truth. The respondents unlawfully acquired their monopoly power solely by filing a tariff with the Federal Communications Commission which absolutely prohibited competition.

The tariff in question provided in part as follows:

> "No equipment, apparatus, circuit or device not furnished by the telephone company shall be attached to or connected with the facilities furnished by the telephone company, whether physically, by induction or otherwise." Tariff F.C.C. No. 132, superseded by Tariff F.C.C. No. 263.

This tariff was filed by respondents without any approval from the F.C.C. The F.C.C. specifically held that the above-referenced tariff was unreasonable, discriminatory and unlawful and that it had been unlawful from its inception. In the Matter of Use of the Carterfone Device in Message Toll Telephone Service, 13 F.C.C.2d 420, 423; recon. den. 14 F.C.C.2d 571 (1968). On reconsideration, it was specifically urged by respondents that the present unlawfulness of the tariff did not justify a finding of past unlawfulness. The F.C.C. rejected this contention and specifically found that the tariff was not only presently unlawful but that it had been unlawful in the past as well. 14 F.C.C.2d at 573. Respondents never appealed from this determination by the F.C.C. Therefore, it is the respondents who have waived their right to argue the legality of the tariff and the resulting monopoly power, not the petitioner.

The Carterfone decisions of the Federal Communications Commission were introduced at the

trial as court exhibits. The proscriptions of the illegal tariff and the resulting monopoly power were in evidence before the jury and, of course, the respondents made no attempt to deny these facts.

This error by the court of appeals had a dramatic and controlling impact on the outcome of this case. It resulted in a conflict between the court of appeals' own opinion in Berkey Photo, Inc. v. Eastman Kodak Company, 603 F.2d 263 (2nd Cir. 1979, cert. denied 444 U.S. 1093). More importantly, it brought the court of appeals' opinion in further conflict with this Court's opinion in United States v. Grinnell Corp., 384 U.S. 553 (1966). Both Grinnell and Berkey clearly recognize the difference in evaluating the actions of firms whose monopoly power was illegally obtained from those whose monopoly power was obtained through superior products, business acumen and historic accident. "Unlawfully acquired power remains anathema even when kept dormant." Berkey at 275.

As set forth above, it was established at trial, conclusively and as a matter of law, that the respondents acquired their monopoly power illegally. The court of appeals missed this point and went on to evaluate the evidence relating to the respondents anti-competitive behavior as if their monopoly power had been innocently acquired through the delivery of superior products and services. This being the case, it is easy to see why the respondents are so anxious to mislead this Court regarding the issue of illegally obtained monopoly power.

The decisions of the Federal Communications Commission are a matter of public record as is the opinion of the court of appeal in this case. In spite of the specific finding by the Federal Communications Commission regarding the unlawfulness of the tariff in issue, the court of appeals has set an antitrust standard for telephone monopolists as if their monopoly power was acquired through honest industry. In effect, the court of

appeals has put its stamp of approval on actions which the Federal Communications Commission specifically found to be unlawful.

To further emphasize the extreme view expressed in Second Circuit Opinion, one can look at page 10 of Respondents' Brief in Opposition, where it states:

> "Thus, the decision of the court of appeals turned on the legal significance of respondents' conduct, not on questions of intent, . . ." (emphasis added)

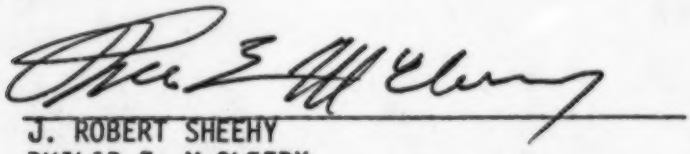
This is exactly the point petitioner presented:

> "1. May a telecommunications monopolist maintain undisputed monopoly power (acquired through illegal tariffs) by employing acts and practices which would not be illegal if carried out by a firm not possessed of monopoly power regardless of its intent? (Petition for Writ of Certiorari to the U.S. Court of Appeals for the Second Circuit, p. i)

In this case, the Supreme Court can decide whether an acknowledged monopolist can intentionally maintain its monopoly as long as its acts are not per se illegal.

To resolve these questions, conflicts and errors, as well as for those reasons set forth in the Petition, this Court should grant certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned, a member of the Bar of the Supreme Court of the United States, hereby certifies that on this 15th day of January, 1982, three copies of the Reply Brief were mailed, first-class postage prepaid, to Howard J. Trienens, 195 Broadway, New York, New York 10017; Harvey Kurzweil and John M. Goodman, 140 Broadway, New York, New York 10005; and William J. O'Keefe, 227 Church Street, New Haven, Connecticut 05606. I further certify that all parties required to be served have been served.

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